



# Final Report

On the State of Arizona's Proposed  
Assumption of Clean Water Act Section  
404 Permit Authority in Compliance with  
the Endangered Species Act

Produced by the Arizona Department of  
Environmental Quality's Endangered Species Act  
Technical Working Group

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*This white paper is solely a product of the volunteer  
technical work group members and should not be  
considered an ADEQ decision document*

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## ABBREVIATIONS AND ACRONYMS

<b>ADEQ</b>	Arizona Department of Environmental Quality
<b>A.R.S.</b>	Arizona Revised Statutes
<b>AZGFD</b>	Arizona Game and Fish Department
<b>BA</b>	Biological assessment
<b>BE</b>	Biological evaluation
<b>BO</b>	Biological opinion
<b>C.F.R.</b>	Code of Federal Regulations
<b>CH</b>	Critical habitat
<b>Corps</b>	US Army Corps of Engineers
<b>CWA</b>	Clean Water Act
<b>EPA</b>	US Environmental Protection Agency
<b>ERT</b>	Environmental Review Tool
<b>ESA</b>	Endangered Species Act
<b>FWS</b>	US Fish and Wildlife Service
<b>HCP</b>	Habitat conservation plans
<b>IPaC</b>	Information for Planning and Consultation
<b>IT</b>	Incidental take
<b>ITP</b>	Incidental take permit
<b>JD</b>	Jurisdictional Determination
<b>MALAA</b>	May affect, likely to adversely affect
<b>MANLAA</b>	May affect, not likely to adversely affect
<b>MOA</b>	Memorandum of Agreement
<b>NEPA</b>	National Environmental Policy Act
<b>OHWM</b>	Ordinary high-water mark
<b>PGP</b>	Programmatic General Permit
<b>§ 404</b>	Section 404
<b>SPGP</b>	State Programmatic General Permit
<b>T&amp;E</b>	Threatened and Endangered
<b>TWG(s)</b>	Technical Working Group(s)
<b>U.S.C.</b>	United States Code, US Code
<b>WOTUS</b>	Waters of the United States

## DEFINITIONS

Action area	All areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action.” (see 50 Code of Federal Regulations. § 402.02)
Action agency	Entity who is applying for a Section 404 permit and not always a defined public agency.
Adverse modification of critical habitat	A direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical. <i>See also Destruction of Critical Habitat</i>
Biological opinion	A document that is the product of formal consultation, stating the opinion of the US Fish and Wildlife Service on whether or not a federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.
Consultation	All federal agencies must consult with the US Fish and Wildlife Service (or National Marine Fisheries Service) when any activity permitted, funded, or conducted by that agency may affect a listed species or designated critical habitat, or is likely to jeopardize proposed species or adversely modify proposed critical habitat. There are two stages of consultation: informal and formal.
Critical habitat	Federally designated areas that contain physical or biological features that are within the geographical area occupied by the species and 1) are essential to the conservation of the species, and 2) which may require special management considerations or protection; and/or are outside the geographical area occupied by the species and are essential for the conservation of the species.
Destruction of critical habitat	A direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical. <i>See also Adverse Modification of Critical Habitat.</i>
Discretionary federal action	An agency judgement on whether or not to <i>take</i> a certain course of action or “those [actions] ‘authorized, funded or carried out’ by a federal agency...[that] must have the requisite causal connection to the specified impact on a protected species” (Davidson, 2006).
Endangered species	A species that is in danger of extinction throughout all or a significant portion of its range.
Endangered Species Act of 1973	A federal law that was passed in 1973 and can be found at 16 United States Code § 1531 et seq. It aims to prevent the extinction of those invertebrates, vertebrates, and plants listed as threatened or endangered.
Formal consultation	The consultation process conducted when a federal agency determines its action may affect a listed species or its critical habitat, and is used to determine whether the proposed action may jeopardize the continued existence of listed species or adversely modify critical habitat. This determination is stated in the US Fish and Wildlife Service biological opinion.
Habitat	The location where a particular taxon of plant or animal lives and its surroundings (both living and nonliving) and includes the presence of a group of particular environmental conditions surrounding an organism including air, water, soil, mineral elements, moisture, temperature, and topography.
Habitat conservation plan	A plan that outlines ways of maintaining, enhancing, and protecting a given habitat type needed to protect species. The plan usually includes measures to minimize impacts, and might include provisions for permanently protecting land, restoring habitat, and relocating plants or animals to another area.

Harass	Actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to breeding, feeding or sheltering.
Harm	An act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.
Incidental take	Take that results from, but is not the purpose of, carrying out an otherwise lawful activity.
Incidental take permit	A permit issued under Section 10 of the federal Endangered Species Act to private parties undertaking otherwise lawful projects that might result in the take of an endangered or threatened species. Application for an incidental take permit is subject to certain requirements, including preparation by the permit applicant of a conservation plan. <i>See Habitat Conservation Plan</i>
Informal consultation	Informal consultation precedes formal consultation and includes any form of communication between the federal action agency, applicant, or designated non-federal representative and the US Fish and Wildlife Service to determine whether listed species may occur in the action area and what the effects of the action may be to such species. This phase is often used to develop project modifications or alternatives to avoid adverse effects to listed species, which would then preclude the need for formal consultation.
Jeopardy	To jeopardize the continued existence of a listed species by engaging in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.
Low-effect habitat conservation plan	Plans involving minor effects on federally listed, proposed, or candidate species and their habitats covered under the habitat conservation plan and minor effects on other environmental values or resources.
May affect	The appropriate conclusion when a proposed action may pose any effects on listed species or designated critical habitat.
Mitigation measures	Actions that reduce or address potential adverse effects of a proposed activity on species covered by a habitat conservation. They should address specific needs of the species involved and be manageable and enforceable. Mitigation measures may take many forms, such as preservation (via acquisition or conservation easement) of existing habitat; enhancement or restoration of degraded or a former habitat; creation of new habitats; establishment of buffer areas around existing habitats; modifications of land use practices, and restrictions on access.
No effect	The appropriate conclusion when the action agency determines its proposed action will not affect a listed species or designated critical habitat.
Not likely to adversely affect	The appropriate conclusion when effects on listed species are expected to be discountable, insignificant, or completely beneficial.
Permit area	The area of fill into waters of the United States and those portions of the project where there is sufficient federal control and responsibility to federalize an otherwise non-federal action.
Section 7	Interagency Cooperation. Section 7 requires federal agencies to: 1) Carry out programs for the conservation of listed species [Section 7(a)(1)]; 2) Ensuring actions funded, carried out, or authorized by the agency do not jeopardize the continued existence of any listed species or adversely modify designated critical habitat [Section 7(a)(2)]; 3) Consult with the US Fish and Wildlife Service when the agency believes its prospective action may take place where listed endangered or threatened species are present and may affect them [Section 7(a)(3)]; 4) Confer with the US Fish and Wildlife Service when the agency's action is likely to jeopardize the continued existence of a proposed species or adversely modify proposed critical habitat (Section 7 7(a)(4)). Section 7 is not discretionary and does not trigger National Environmental Policy Act.

Section 9	Prohibited Acts Related to Fish and Wildlife per the Endangered Species Act of 1973 as amended through the 108 <sup>th</sup> Congress includes the following actions: import or export; take any such species within United States/territorial sea; take upon the high seas; possess, sell, deliver, carry, transport, or ship deliver, receive, carry, transport, or ship in interstate or foreign commerce sell or offer for sale in interstate or foreign commerce, or violate any regulation pertaining to such species or to any threatened species listed pursuant to Section 4 of this Act.
Species	Any species or subspecies of fish, wildlife or plants, and any distinct population segment of vertebrates which interbreeds.
Take	To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct per the Endangered Species Act of 1973 as found at 16 United States Code § 1531 et seq.
Threatened species	Any species that is likely to become an endangered species within the foreseeable future.

# 1 INTRODUCTION

## 1.1 Purpose

In April 2018, Arizona's Governor, Doug Ducey, signed Senate Bill 1493 into law. This action amended Arizona Revised Statutes (A.R.S.) Title 49, Chapter 2, by adding Article 3.2, which granted the Arizona Department of Environmental Quality (ADEQ) authority to develop rules to assume the Clean Water Act (CWA) Section 404 Program (Section 404). *State assumption* is the term used when a state develops a program and operates it under its own authority.

The ADEQ Water Division formed Technical Working Groups (TWGs) to assist in developing a program to assume CWA 404 permitting for Arizona. Each TWG was composed of volunteers, chosen by ADEQ, to make recommendations to the CWA Section 404 Executive Committee on a variety of important topics. For 5 months, the Endangered Species Act (ESA) TWG reviewed how the US Army Corps of Engineers (Corps) complies with the ESA when administering the Section 404 permit program, researched the options ADEQ has to develop a Section 404 permit program that complies with the federal program requirements (40 Code of Federal Regulations [C.F.R.] § 233.1(d) and A.R.S. § 49-256.01(A)), discussed how ADEQ may develop a program, deliberated the best options for ADEQ, and considered what would be needed to transition from the current federal program to one administered by ADEQ.

## 1.2 Objective

The ESA TWG's objective was to provide this white paper to address questions as they relate to Arizona's assumption of the Section 404 program and following the requirements as specified by 40 C.F.R. § 233.1(d), which reads, "States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose." As specified in the ESA TWG Charter (Appendix A), the following issues were identified for the group to address:

- What is the current state?
- What are the specific benefits and challenges of the current federal process?
- What is the ideal future state for implementing endangered and threatened species protection requirements? Why is this the ideal future state?
- Identify the gaps between the current state and the ideal future state.
- Provide gap closure options to enact the future state (i.e., what entities involved, what agreements, rules, other laws may be necessary to enact future state. (Note: this does not contemplate modifying federal law.)
- What are the potential obstacles to implementing each gap plan option?

The ESA TWG considered the above bullet points and came up with additional issues that need to be addressed in Section 404 assumption in dealing with the ESA.

## 1.3 Committee Members

Special thanks go to the following TWG members and facilitators for providing their valuable time and expertise to produce this report (Table 1).

**Table 1. ESA TWG Committee Members and Facilitators**

<b>Name</b>	<b>Affiliation</b>
Carrie Marr, Chair	US Fish and Wildlife Service
Kris Randall, Co-Chair	US Fish and Wildlife Service (Retired)
Robert Anderson	Fennemore Craig
Matthew Camba	Woodplc
Clay Crowder	Arizona Game and Fish Department
Rafael de Grenade	HILGARTWILSON, LLC
Nicole Engelmann	US Fish and Wildlife Service
Terry Enk	Freeport-McMoRan, Inc.
Heather Finden	City of Phoenix Water Services Department
Jill Himes	Himes Consulting, LLC
Mark Horlings	Maricopa Audubon Society
Nancy Johannesmeyer	ASARCO
Norman D. James	Fennemore Craig
Keith Knutson	Arizona Game and Fish Department
Jennifer Martin	Sierra Club
Jenny Neeley	Pima County Office of Sustainability & Conservation
Laura Stewart	Archaeological Consulting Services, Ltd.
Jim Tress	Westland Resources, Inc.
Russell Waldron	SWCA Environmental Consultants
<b>Facilitators</b>	
Kelly Cairo	GCI
Jill Hankins	ADEQ
Heidi Welborn	ADEQ

## 2 BACKGROUND

### 2.1 Overview of Endangered Species Act

To supplement the ESA TWGs recommendations, an overview of the ESA is needed to provide context. The ESA of 1973 (16 United States Code [U.S.C.] §§ 1531-1544, as amended) was enacted “to provide a means whereby the ecosystems upon which threatened and endangered [T&E] species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in the [ESA]” (16 U.S.C. § 1531(b)).

The major provisions of the ESA that are relevant to this report, and their purpose, are as follows:

1. Section 4 – “Determination of Endangered Species and Threatened Species” sets requirements and standards for listing species as either threatened or endangered; allows any interested person to petition for a species listing, describes processes for emergency listings, recovery plans, and designations of critical habitat (CH).
2. Section 6 – “Cooperation with the States” provides for cooperation in endangered species conservation with the states, including matching federal funding and delegation of permitting authority.
3. Section 7 – “Interagency Cooperation” requires federal agencies to insure their actions do not jeopardize the continued existence of listed species or adversely modify designated CH. It also requires that federal agencies to use their authorities to conserve listed species:
  - a. Section 7(a)(1) directs the Secretary (Secretary of the Interior/Secretary of Commerce) to review other programs administered by them and use such programs to further the purposes of the ESA. It also directs all other federal agencies to use their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of species listed pursuant to the ESA. The Secretary of Commerce, through the National Marine Fisheries Service, is responsible for administering the ESA with respect to marine species. Arizona does not contain any marine species. Consequently, the Secretary of the Interior, through the US Fish and Wildlife Service (FWS), administers the ESA in this state.
  - b. Section 7(a)(2) states that each federal agency shall, in consultation with the Secretary, insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated CH (§ 1536(a)(2)). This section of the ESA sets out the Section 7 consultation process that all federal agencies must follow when a discretionary federal action may impact threatened or endangered species. The consultation process is further implemented by regulation at 50 C.F.R. § 402.
4. Section 9 – “Prohibited Acts” includes prohibitions against import, export, or transport of listed wildlife and plants. It prohibits *take* (see definitions) and possession of wildlife, but not plants. It also prohibits take of any listed fish or wildlife species listed as endangered. However, by rule the prohibitions that apply to endangered species also apply to threatened species, unless

otherwise provided for through a special rule under Section 4(d) of the ESA (50 C.F.R. § 17.31(a)).

The take prohibition applies more narrowly to plants. It is unlawful to remove or to maliciously damage or destroy listed species of plants found on land under federal jurisdiction, and to damage or destroy listed species of plants found on other land “in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law” (16 U.S.C. § 1538(a)(2)(B)). Thus, the ESA does not prohibit destruction or removal of listed species of plants found on non-federal land, provided that the landowner complies with any applicable state law requirements.

5. Section 10 – “Exceptions” provides for certain permits, including for “any taking otherwise prohibited by Section 9 if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity” (§ 1539(a)(1)(B)). For landowners to obtain this Section 10 permit, they must develop a conservation plan as prescribed in Section 10(a)(2)(A) and its implementing regulations at 50 C.F.R. §§ 17.22, 17.32 and 50 C.F.R. §§ 222.25, 222.27, and 222.31.

The plan must specify the impacts that are likely to result from the taking, the measures the permit applicant will undertake to minimize and mitigate such impacts, and the funding that will be available to implement such measures. Conservation plans under Section 10(a)(1)(B) are generally known as habitat conservation plans (HCPs). Section 10(a)(2) of the ESA sets forth the statutory criteria that must be satisfied before an incidental take (IT) permit can be issued.

## 2.2 Clean Water Act Section 404 and Endangered Species

State assumption of the Corps CWA Section 404 permitting program is governed by CWA Section 404(g)–(k), 33 U.S.C. §§ 1344(g)–(k), and by the EPA’s regulations at 40 C.F.R. §§ 233 – 404 State Program Regulations, which include provisions guiding state program approval, permit requirements, and program operation, among other things. A key requirement for state assumption is that the state’s program must “be conducted in accordance with the requirements of the [CWA];” while a “state may impose more stringent requirements” than the federal permitting program, it is prohibited from imposing “less stringent requirements” (40 C.F.R. §§ 233.1(d)). This is outlined in A.R.S. § 49-256.01, which requires the ADEQ Director to establish a program for Arizona “that is consistent with and no more stringent than the [CWA] Dredge and Fill Program, including a permitting process.”

Among the requirements that the state must adhere to is the requirement that it will issue Section 404 permits that comply with the 404(b)(1) Guidelines found at 40 C.F.R. § 230 that govern the specification of disposal sites for dredged or fill material (see 33 U.S.C. § 1344(h)(1)(A)). Among other things, the guidelines prohibit the discharge of dredged or fill material if the discharge “[j]eopardizes the continued existence of species listed as endangered or threatened under the [ESA] . . . or results in likelihood of the destruction or adverse modification of . . . [critical] habitat . . . under the [ESA]” (40 C.F.R. § 230.10(5)(b)(3)). Thus, while a state’s assumption of the Section 404 permitting program effectively eliminates the requirement to consult with the FWS under ESA Section 7 because there is no longer a discretionary federal action, the state is still required under the 404(b)(1) Guidelines to ensure that any permit issued will not jeopardize federally listed species or adversely modify CH.



The Section 404 State Program Regulations outline a mandatory process for the US Environmental Protection Agency (EPA) review of state Section 404 program permit applications; this process is detailed in 40 C.F.R. § 233.50 (Figure 1). Under 40 C.F.R. § 233.51(b), there are six instances in which EPA cannot waive review of applications for permits, including those that authorize “discharges with reasonable potential for affecting endangered or threatened species.” Consequently, the state is required to forward the public notice for such applications to the EPA; and the EPA in turn must provide those public notices to the FWS and the Corps for their review and comment (40 C.F.R. § 233.50(a)(1) and (b)). EPA may, but is not required to, object to a permit application, after receiving comments from the FWS and Corps (40 C.F.R. § 233.50(d) and (e)).

## 2.3 Federal Scope of Analysis

The scope of protection provided under Section 7 depends to a great extent on the authority and jurisdiction of the federal agency that is proposing an action. The relevant agency in this case is the Corps, which is authorized under Section 404 to regulate and issue Federal permits (with EPA oversight) for “the discharge of dredged or fill material into the navigable waters at specified disposal sites” (33 U.S.C. § 1344(a)). The scope of the Corps’ review of impacts when issuing a permit is governed by the 404(b)(1) Guidelines and the agency’s public interest review regulation, found at 33 C.F.R. § 320.4. The scope of review under both regulations is limited to the impacts that will be caused, directly and indirectly, by the proposed discharge into waters of the United States (WOTUS), which is the activity over which the Corps and EPA have jurisdiction under Section 404.

The extent of federal control and responsibility afforded the Corps under Section 404 in turn determines the scope of Section 7 consultation under the ESA. As discussed above, Section 7(a)(2) of the ESA requires each federal agency to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat” for such species (16 U.S.C. § 1536(a)(2)). Thus, Section 7 applies only to federal actions, and not to state or private actions. Moreover, by rule, Section 7 extends only to actions over which there is *discretionary* federal involvement or control (50 C.F.R. § 402.03).

Consequently, the scope of Section 7 consultation on a proposed Section 404 permit normally should extend only to the impacts of the discharge of dredged or fill material at the disposal site. In some cases, however, the scope of consultation may extend beyond the disposal site. This may be a result of the definition of the term *action area* in the FWS’ regulations, which means “all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action” (50 C.F.R. § 402.02). Consequently, the analysis of the effects of the proposed discharge on listed species and CH may extend beyond the project area, depending on the extent of the proposed discharge’s effects.

In addition, the FWS’s definition of the term *effects of the action* includes both the direct and indirect effects of the action that is the subject of the consultation (50 C.F.R. § 402.02). Under this definition, *direct effects* are the direct or immediate effects on listed species and CH caused by the proposed discharge. *Indirect effects* are those that are caused by the proposed action and are later in time, but are still reasonably certain to occur. Generally speaking, indirect effects are “the effects on listed species or CH of future activities that are induced by the action subject to consultation and that occur after that action is completed,” provided that these effects are reasonably certain to occur (*Interagency*

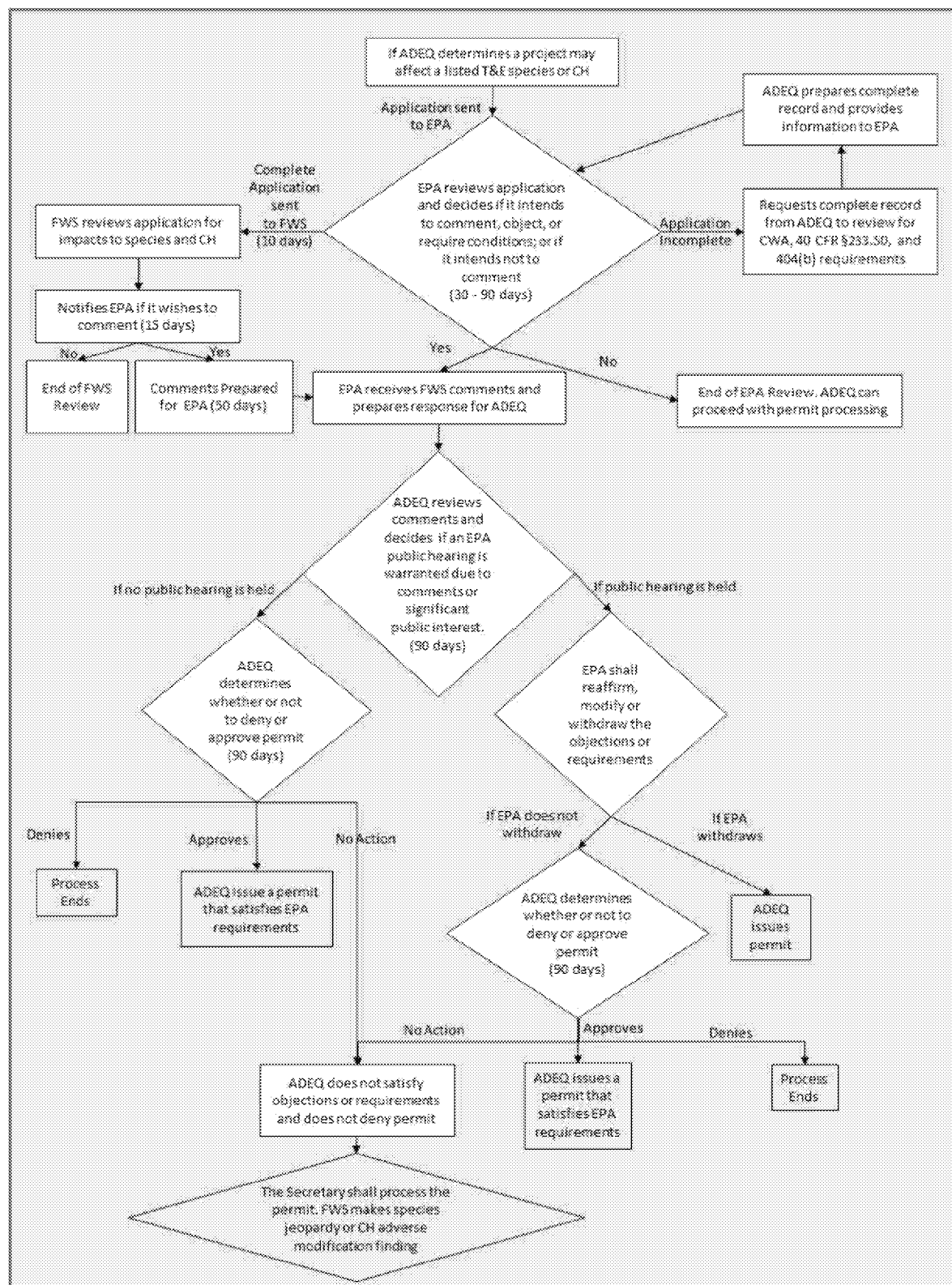


Figure 1. Federal Coordination Required Under 40 C.F.R. 233.50 Flow Chart (diamonds indicate decision action; blue indicates an end to the process.)

*Cooperation – Endangered Species Act of 1973, as amended; Final Rule*, 51 Fed. Reg. 19,926, 19932 (June 3, 1986)).

For example, the impacts caused by the construction of a street crossing or flood control structure within a watercourse subject to Corps jurisdiction under Section 404 would constitute direct effects of the Corps permit, while future impacts caused by the placement of structures and fill material within the watercourse that are reasonably certain to occur (e.g., altered stream flows or increased downstream sedimentation) would constitute indirect effects of the permit. In this example, the *action area* associated with the Corps permit would include not only the portion of the watercourse directly impacted by the construction of the street crossing, but also any areas upstream or downstream of the crossing that are reasonably certain to be impacted in the future. See *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (holding the Corps properly considered the indirect effects on downstream CH of the whooping crane along the Platte River that would result from the construction of a dam on a tributary of the river).

Not all listed resources are afforded the same protections under the ESA on private, state, and other non-federal lands. Fish and wildlife (including invertebrates) are subject to the ESA Section 9 prohibitions against take, regardless of land ownership or federal agency involvement. Designated CH for animals and plants is only afforded ESA protection if there is a discretionary federal action (federal land, federal funding, federal permitting, etc.) triggering Section 7. Similarly, beyond those protections provided by state regulation, listed plants would only be protected from impacts that result from the federal action. For those portions of a larger project that are outside of the Corps' CWA jurisdiction and have no other federal nexus, plants are not afforded protections from impacts that might result from project activities, provided that applicable state regulations protecting the listed plant are followed.

As illustrated above, the extent of protection afforded listed resources under the current Section 404 permit program is fact-dependent, first depending on the determination of the Corps' jurisdiction (i.e., the presence and extent of WOTUS) and then on the determination of the action area. Similarly, the ability to obtain protection from "take" of listed animals provided by an IT statement issued during Section 7 consultation is dependent upon the specific facts and circumstances associated with a given project.

A review of the current list of threatened and endangered species known or suspected to occur in Arizona indicates that, except for Pima pineapple cactus, there are few listed species that are widespread and with distributions that encompass large amounts of private or state lands. In the recent past, species such as the cactus ferruginous pygmy-owl had a much greater effect on private and state land development projects prior to the determination by FWS that the listing of this species was not warranted. A future decision to list a species with a potential distribution that encompasses large areas of private or state lands in areas where development activities are occurring (e.g., desert tortoise) would change the potential implications of state assumption of CWA Section 404 permitting authority with regard to the substantive requirements of the ESA.

### 3 CURRENT STATE

#### 3.1 Summary of Section 404 Permit Process

Currently in Arizona, the Corps administers the CWA Section 404 program which regulates the discharge of dredged or fill material into WOTUS. There are two basic steps to Section 404 permitting compliance: 1) determine the extent (i.e., the geographical limits of jurisdiction) of WOTUS on a project area; and 2) determine the level and types of “permissible” proposed project impacts to WOTUS that would require the Corps to grant permission or issue a CWA Section 404 permit. This process is outlined in Figure 2.

Under the Corps’ current process, a preliminary jurisdictional determination (JD) or an approved JD is completed by the applicant to determine the extent of WOTUS within the proposed project area (i.e., the area within the ordinary high-water marks (OHWMs)). In some cases, during a pre-application meeting between the Corps and the applicant, the JD for a project will be a subject of discussion so that the determination and permit application submittal can be made concurrently. The JD is reviewed and finalized by the Corps, which may or may not agree with what was proposed by the applicant. The CWA Section 404 Assumption: *Jurisdictional Determinations* TWG White Paper provides further details on the nuances and current protocols for determining the WOTUS area for a project.

Once the extent of WOTUS has been verified on a project area by the Corps, project proponents are then directed to design their project to first avoid, then minimize impacts to WOTUS to the maximum extent practicable. Any unavoidable impacts to WOTUS by project activities through the addition of dredge or fill material within the OHWMs of a WOTUS needs to be approved, verified, or permitted by the Corps via the appropriate level of Section 404 Permit. The Corps has basically three levels or options of Section 404 permits:

- a nationwide general permit; a set of 52 national permits developed by the Corps by specific category of activity or activities that allow for a streamlined permitting process for applicants with minimal amount of impacts to WOTUS (typically less than 0.5 acre of permanent impacts allowed per activity),
- a regional general permit; issued regionally for a specific category of activity or activities, or;
- an individual permit; typically issued for more impacts than allowed under a nationwide general permit and/or for activities not covered under a regional general permit.

See the Final Report of the ADEQ Section 404 *Permit Process* TWG for details of the current applicability of the permit option(s) for a project activity.

#### 3.2 Endangered Species Act Section 7 Compliance

Regardless of the level or type of Section 404 permit required, and because the Corps is a federal agency, the Corps must ensure that any permitted action it authorizes under the CWA is not likely to jeopardize the continued existence of any species listed under the ESA or destroy or adversely modify any designated CH in accordance with ESA Section 7(a)(2). The Corps must also ensure that the permitted action will not take any federally listed species or, if take is likely to occur, obtain authorization for such IT, in accordance with ESA Section 7(b)(4) and (o).

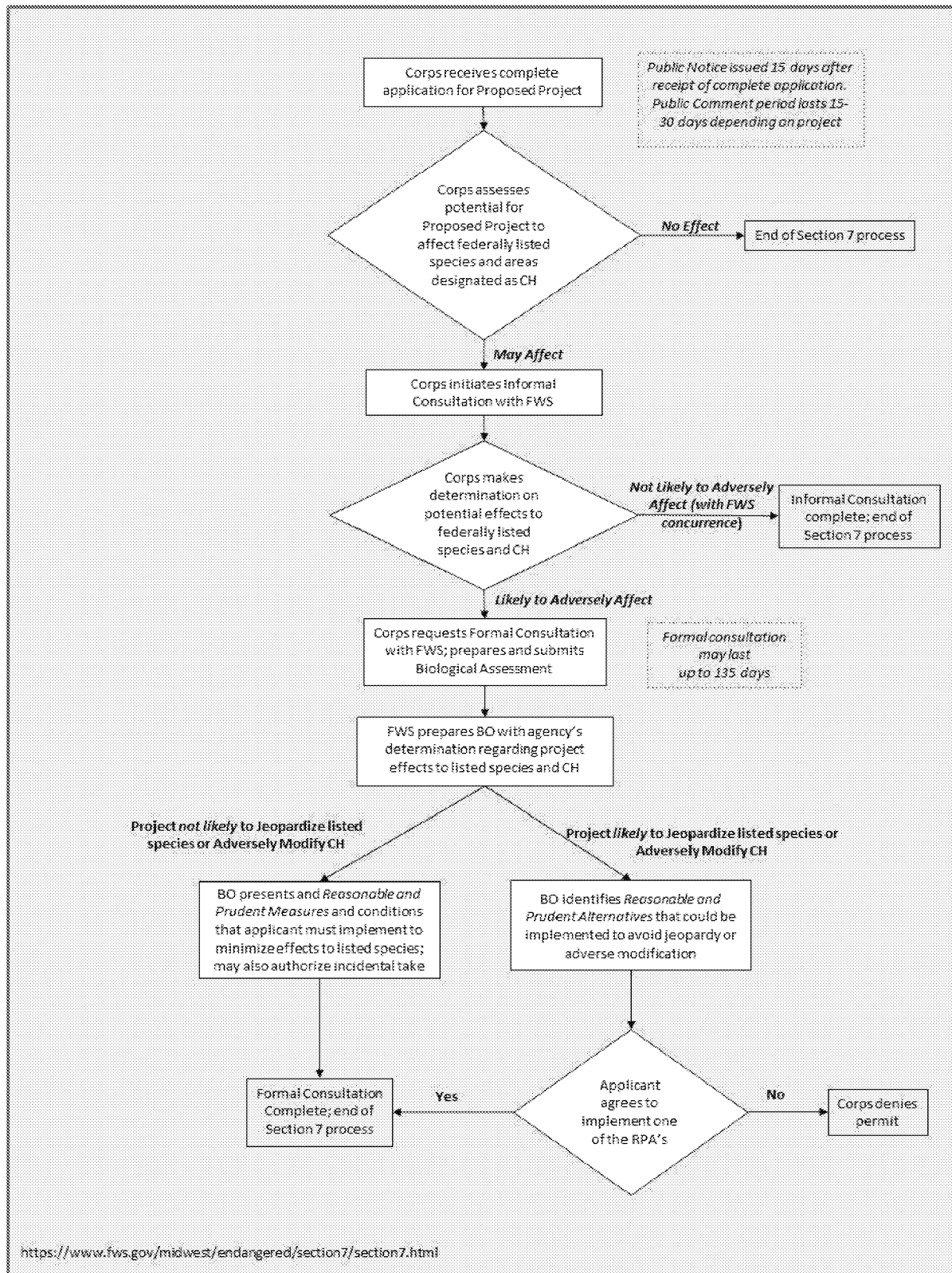


Figure 2. Current Section 7 Consultation (simplified)

### **3.2.1 Biological Evaluation or Biological Assessment**

In the case when the Corps is the lead federal agency and to ensure that the discharge and related activities authorized by a Section 404 permit do not result in “take”, jeopardy, or adverse modification of CH, the Corps requires all 404 permit applicants to document compliance with the ESA through the completion of a biological evaluation (BE) or biological assessment (BA).

One of the first steps in completing a BE or BA for a project is to determine the project’s action area. Under the FWS’s Section 7 regulations, as discussed above, the action area is defined as “all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action” (50 C.F.R. § 402.02). There are no bright line rules or guidance to determine the action area, which is project-specific and depends on the nature and extent of the effects of the discharge to be authorized by the Section 404 permit.

An applicant’s biologist (or consulting biologist) visits the action area to document and describe vegetation types and other habitat features potentially important to federally listed species and, in some instances, conducts species-specific surveys if project area conditions warrant. Based on site reconnaissance and available sources of information on habitat requirements and distribution, the action area is then evaluated for the potential presence of such species, and a determination of effect of the proposed discharge and any related activities to federally listed species and CHs is made for each.

The BE report, at a minimum, includes an introduction, a description of field reconnaissance and/or survey methods, a summary of vegetation communities and other habitat features, narrative descriptions of federally listed species that have the potential to occur in or near the action area, and a rationale for why other federally listed species were eliminated from more detailed consideration. In addition, an effect determination based on the analysis is made for all species that may occur in the vicinity of the project. There are several data sources to assist in the evaluation of potential for listed species and CH in a project area including the Arizona Game and Fish Department (AZGFD) Arizona Heritage Geographic Information System online environmental review tool and the FWS Information for Planning and Consultation (IPaC). The results of the databases searches are documented in the BE.

This BE or BA is adopted by the Corps (sometimes after directing the applicant to make revisions) for use in consulting under Section 7 of the ESA with the FWS. As stated above, this consultation is undertaken to determine whether the proposed activity is likely to jeopardize the continued existence of any listed species or destroy or adversely modify any designated CH.

There are three basic effect determinations for species listed under the ESA: 1) no effect; 2) may affect, not likely to adversely affect (MANLAA); and 3) may affect, likely to adversely affect (MALAA).

In the case where the Corps is not the lead federal agency, such as projects that occur on federal land, then typically the lead federal agency completes the consultation with the FWS, and the Corps cooperates and uses the consultation results to satisfy ESA compliance for the Section 404 permit.

For those permits in which an MALAA determination for a species applies, a much more detailed analysis is completed, and the Corps and FWS uses the BE or BA to initiate formal Section 7 consultation. The FWS uses the BE or BA as a starting point to formulate a biological opinion (BO), a document that contains recommendations, conditions, reasonable and prudent measures, and an IT statement.

### **3.2.2 Determinations**

If the project activities have no effect to any species or CHs listed under the ESA, then the Corps does not need to consult with the FWS. In fact, the FWS does not concur with no effect determinations. If the project activities may affect but are not likely to adversely affect any species or CHs listed under the ESA and the impacts are insignificant and discountable, then the Corps would send the BE to the FWS and request concurrence with the MANLAA determination. However, it should be noted that while the Corps, as the lead federal agency, makes the MANLAA determination, the FWS must concur with the determination. This process is known as informal consultation. If the FWS does not concur, then formal consultation is required (50 C.F.R. §§ 402.13(a), 402.14(b)).

### **3.2.3 Formal Consultation and Incidental Take**

Currently, for cases where project activities have a MALAA determination for one or more federally listed species or CH, or where the FWS does not concur with the Corps' MANLAA determination, the Corps and the FWS enter into a formal consultation regarding the effects of the proposed permit action. The time frame for completing consultation is 135 days; although the time period is frequently extended for larger, more complex projects and may take substantially longer to complete. At the end of consultation, the FWS completes the BO and issues the IT statement, if IT is likely to occur. The IT statement protects the Corps and the 404-permit applicant (if all of the reasonable and prudent measures, and the mandatory terms and conditions are followed) from prosecution under ESA Section 9 in the event that a species is "taken" incidental to the authorized activity.

The formal ESA Section 7 process is a federal agency to federal agency process. It is not available to non-federal agencies like ADEQ, or to a private individual, company, landowner, or non-governmental organization who are working on their own behalf, not with any federal agency. For non-federal landowners, IT protection can instead be permitted under ESA Section 10. This provision allows the FWS to issue an IT permit (ITP) authorizing the taking of members of listed species, provided that the taking is "incidental to and not the purpose of, the carrying out of an otherwise lawful activity" (16 U.S.C. § 1539(a)(1)(B)). The holder of an ITP is not liable for any takings that fall within the scope of, and are consistent with, the ITP. The process and requirements for obtaining an ITP are complex, time-consuming and expensive, however, which discourages their use. These requirements include negotiation of an HCP acceptable to the FWS, completion of Section 7 consultation, compliance with the National Environmental Policy Act (NEPA), and completion of a public notice and comment process.

## **BENEFITS**

- Current Section 404 permitting through the Corps has an established procedure for Section 7 consultation through which the FWS insures protection of federally protected species.
- The current Section 7 process is familiar to industry and partners.
- The current Section 7 process provides Section 404 permit applicants an avenue to obtain an IT statement, if needed.
- Informal consultation with the Corps can be completed in as little as 30 days, although it can take significantly longer in some cases.

- Timelines for formal consultation are established, with the concurrence of the Corps, the FWS may exceed the timelines due to its workload and project complexity.
- Currently designated CH and federally listed species that occur on private land receive some protection through the Section 7 consultation process when a Corps permit is required.

## CHALLENGES

- The bar is low for initiation of Section 7 consultations (i.e., for informal consultations the threshold is a “possible effect” to listed species or CH.)
- The Section 7 process can be complicated for those not familiar with it, and applicants may be required to hire professional consultants to help navigate it.
- The action area and scope of Section 7 consultation can be difficult to define and may lead to Section 7 consultation on aspects of non-federal projects over which there is no Corps jurisdiction under the CWA.
- There is inconsistency between how projects are written and reviewed (e.g., geographic area leads at the FWS write BOs with input from species leads; can also be a problem with Corps regulators)
- The bar is higher to demonstrate take and FWS is not allowed to issue an ITS unless take is “reasonably certain to occur.”
- Section 10 permits for non-federal actions are an avenue to obtain authorization for IT and can be complicated, time consuming, and expensive. In Arizona, where there is a lot of federal land, Section 10 permit are uncommon, and as a result, they are an unfamiliar process to industry, partners, and agencies.

## 4 SUMMARY OF RESEARCH

The ESA TWG focused its research on these topics:

1. How many Section 404 permit applications raise ESA issues?

The ESA TWG members reviewed Corps records of general and individual permits in Arizona cases and FWS records of ESA consultations. Between 2008 and 2017, the Corps received approximately 2,654 permit requests. Of these, 46 resulted in “may affect” determinations which equates to around 2% of permits resulting in informal and formal consultations. The amount of time required to complete informal consultation for a permit averaged 204 days, and if the permit went through formal consultation, the average number of days to completion was 417.

However, these statistics could be misleading. After further consultation with Corps project managers, it was found that the majority of applications involve endangered species issues, although the end result may be that Section 7 consultation is not necessary. Applicants often work informally with the Corps to change or reduce the permit area, minimize impacts by changing or amending the project, reducing the permit area, etc., so that by the time they issue



the permit, there is no effect. The Corps does not record this type of information (i.e., the frequency of these changes).

Another consideration is the number and type of listed species between 2008 and 2017. The cactus ferruginous pygmy-owl was not listed during this timeframe, but when it was listed, the number of informal and formal consultations the Corps processed was much larger. Also, if the Sonoran Desert tortoise had been listed, the number of consultations would have increased. Any species listed in the future may impact the number of consultations.

2. Will ADEQ's assumption of the Corps role in Section 404 end "federal action?" (i.e., will there be a federal nexus when ADEQ administers the 404 program?)

Consultation under Section 7 of the ESA will no longer be an option, and permittees will no longer be protected from liability for IT of endangered species, unless EPA objects to a proposed permit and the permit is issued by the Corps as a result, or a permittee opts to apply for a Section 10 permit.

3. Do protections for IT under ESA Section 10 offer a reasonable alternative?

Section 10 authorizes IT if the permit follows preparation of an approved HCP. Because Texas is primarily private land, applicants there often apply for project-specific HCPs. ESA TWG members contacted an FWS employee and a consultant working in Texas to obtain more information about this process. They reported that project-specific HCPs shield permittees from liability but typically take 2 years or more to complete.

As another alternative, Arizona's Pima County prepared a countywide HCP (called a Multi-species Conservation Plan or MSCP) and received a 30-year ITP, which now allows Pima County and participating private applicants who need certain General or Regional 404 permits to receive those permits without being required to go through FWS consultations for individual projects or provide any additional mitigation measures beyond what has already been provided, greatly streamlining the 404 permitting process. However, Pima County's ITP took 20 years to prepare and receive the necessary approvals from FWS, and the County devoted more than \$100 million of taxpayer-approved bonds to protect habitat that serves as mitigation for the MSCP. Some ESA TWG members worked on the Pima County MSCP and were familiar with it.

4. Could ADEQ provide an "off-ramp," allowing permit applications involving the ESA to be referred back to the Corps for decision and FWS for consultation under Section 7, thus providing IT protection?

One of the greatest challenges facing state assumption of the Section 404 Permitting Program is the ability to obtain IT protection under the ESA. While providing IT protection to the state or applicants is not required under Section 404(b)(1) guidelines or the assumption regulations found at 40 CFR 233.51, it is a critically important aspect of the existing Section 404 permitting program and ESA TWG members recommend that the state should find a way to address IT protection if they assume the 404 program. To address this issue, the ESA TWG proposed an option called the "off-ramp." (Note: This is described in greater detail as Option 2 later in the document.) The ESA TWG debated whether the "off-ramp" alternative would be considered partial assumption. Under 40 C.F.R. § 233.1(b), states are prohibited from partial assumption of Section 404 responsibilities.

That being said, the “off ramp” may be a viable option for obtaining IT protection, provided that its process operates within the existing process under which EPA, the FWS and the Corps review and object to state permits under 40 C.F.R. § 233.50.

The other states that have assumed, or have considered assuming Section 404 primacy have met their obligations for endangered species protections under the controlling regulations in the following ways:

- a. New Jersey refers determinations to FWS pursuant to a Memorandum of Agreement (MOA), but does not provide IT protection;
  - b. Michigan evaluates endangered species protections under its own state statute, which helps flag permits which need federal additional review;
  - c. Florida addressed the question of partial assumption prohibited by 40 C.F.R. § 233.1(b) to the EPA, but did not receive a definite response;
  - d. Oregon considered referring endangered species issues identified by state agencies to the EPA and its own Department of State Lands for joint review. Oregon ultimately decided not to pursue assumption, but it is our understanding Oregon is developing a statewide HCP prior to assuming the program.
5. Should Arizona adopt its own legislation addressing endangered species in order for ADEQ permits to provide the equivalent protection required for assumption?

As a preliminary matter, it is unnecessary for the state to adopt such legislation, although it can be helpful for implementing a state 404 program, as evidenced by Michigan’s program (and to a certain extent, New Jersey’s program) which relies on state legislation for adequate endangered species protections. Section 404 does not require that a state program provide a level of protection for T&E species and their habitat equivalent to the ESA. Instead, the requirements for assumption concern discharges of dredged or fill material into WOTUS and the protection of WOTUS through the control of such discharges (see 33 U.S.C. § 1344(g) & (h); 40 C.F.R. § 230.1(a)).

In addition, the problem lies with ensuring that a discharge into WOTUS permitted under the state’s program does not result in jeopardy to a species or adverse modification of CH. Moreover, the ESA prohibits take of species under Section 9, a federal requirement that is not addressed under the regulations controlling the assumption process. These federal law requirements would continue to apply even if the state decides to adopt a state endangered-species program.

To date, only Michigan and New Jersey have assumed the responsibility for Section 404. The TWG researched both states’ legislation, as well as EPA’s subsequent monitoring and review of their programs. Appendix B summarizes states’ laws and procedures and other details surrounding their assumption. Additionally, both Michigan and New Jersey have wetlands protection and endangered species protection statutes. Michigan’s state endangered-species law protects federally listed, as well as state-listed, species.

Prior experience enforcing state wetlands and endangered species statutes would benefit ADEQ and would provide staff experience and expertise. Nevertheless, if ADEQ assumes Section 404 responsibility, it will be enforcing the federal CWA statute. Comparable Arizona state legislation is not required.

6. Can ADEQ use MOAs with federal or state agencies to provide the FWS an opportunity to review permits early to determine whether jeopardy to listed species or adverse modification of CH are likely and to insure efficient processing of permit applications?

Both New Jersey and Michigan have formal agreements with the EPA (as required by 40 C.F.R § 233.13), FWS, and other federal agencies to assist in processing applications, to publicize the Section 404 program, and to ensure that EPA's oversight continues as the CWA requires. ADEQ would also be required to negotiate similar agreements. Examples of New Jersey's and Michigan's MOAs are provided in Appendix C. TWG members spoke with federal and state officials working under these agreements, as well as state officials that decided not to assume Section 404 responsibility.

In addition to researching particular topics, members of the ESA TWG shared their professional experience and information from other states with the current program. The Chief of the Arizona Corps Permitting office attended a TWG meeting to explain current permit processing, and an FWS employee that reviews 404 permits in New Jersey spoke to the ESA TWG by conference call.

7. Does EPA have discretion when the state issues individual permits?

When EPA approves the transfer of the program to a state, there is no federal nexus because its approval is not a discretionary action (Silva 2010); however, there is uncertainty regarding EPA's discretion over the permit approval step under federal review in accordance with 40 C.F.R. 233.50., which may trigger Section 7 consultation.

## **5 OPTION CONSIDERED BUT NOT CARRIED FORWARD: STATE PROGRAMMATIC GENERAL PERMIT**

The ESA TWG believes that the best future Section 404 Program would be one where ADEQ could provide protection for listed species and CH in accordance with the 404(b)(1) Guidelines while providing legal protection for applicants.

Criteria used to evaluate future options included those that offered the greatest protection of species and habitat, feasibility in implementing a program, legal protection offered to the permittee and ADEQ, and the time and/or ability to obtain IT coverage. The ESA TWG developed two options that were considered but the group decided not to propose as a future option.

An alternative to full assumption of the 404 program that was investigated is adoption of a State Programmatic General Permit (SPGP). A programmatic general permit (PGP) is a type of regulatory permit issued by the Corps and authorizes states, local governments, tribes, or other federal agencies with regulatory programs comparable to the Corps' Section 10 or Section 404 program to issue permits for specified activities in lieu of direct Corp's issuance of such permits. An SPGP is a type of PGP that is

administered by a state agency and designed to eliminate duplication of efforts between Corps districts and states, as well as to make the permitting process more efficient with flexibility as to the geographic region covered. Federal review of activities authorized under SPGPs is triggered by acreage impacts, otherwise known as thresholds. The SPGP provides a venue for Section 7 consultation and IT coverage for both the state and applicants for a range of activities that could be permitted by the state.

This offers IT coverage for actions within the scope of the SPGP. Authorizations are issued to applicants for small projects with minimal impacts. When applicants file for a project with a state agency, it usually appears to the public as though only the state is involved—unless the Corps needs to request additional information. During this transparent screening process, the state determines the level of impact and under which category each permit application will be reviewed. The Corps is then involved with the permit review process and meets regularly with the state regulatory staff, as well as those from FWS and EPA to review the applications and check for the need for mitigation or an individual permit. Types of activities covered by an SPGP might include fill, bank stabilization, dredging, moorings, repair or maintenance of fill projects. States may tailor the SPGPs to suit their needs and streamline the permitting process for the regulated community.

Depending on the types of activities covered by an SPGP, there is a range of benefits, as well as challenges to a state agency and the regulated community.

## 5.1 Benefits

- An SPGP may reduce unnecessary paperwork by eliminating duplicate efforts of both the state and Corps district.
- May also increase certainty and timeliness, ensure resource protection, and improve compliance from a consumer relations standpoint.

## 5.2 Challenges

- Realized permitting efficiency depends on the types of activities covered in the permit, the level of support and collaboration with other agencies and partners, as well as how an SPGP fits into existing wetland regulatory programs.
- The inherent nature of an SPGP limits the type and size of activities under Section 404 to be permitted.
- Additional requirements of an SPGP (including ESA screening and permit conditions) may not always result in permitting efficiencies.

This option was not given further consideration for two reasons: 1) The State of Arizona does not already have a program in place for the regulation of activities in waters. Issuance of an SPGP is predicated on an existing state program; and 2) the development of an SPGP falls short of the goal of full assumption of the 404 program by the State of Arizona.

## 6 PROPOSED OPTIONS

The following considerations were used to develop options for ADEQ:

- Provide an avenue for some projects to get into the Section 7 process to provide IT coverage where needed (i.e., when there is a reasonable potential for “take” to occur to a species listed under the ESA), even though IT protection is not required.
- Provide an avenue for permit applicants to obtain IT coverage under Section 10 of the ESA.

The ESA TWG developed four options and two minority opinions for ADEQ’s consideration. While reviewing the options below, the group could not come to consensus on one single approach needed for T&E species protection in Arizona. Provided at the end is a survey summary of the member’s support or level of agreement for reference. However, there are some components of each option that could be considered by ADEQ in moving forward with state assumption of the Section 404 Program. It should be emphasized that the options discussed below are not mutually exclusive.

For example, the MOA option (Option 1) is actually the core of the “off-ramp” (Option 2). A non-federal permit applicant can elect to seek an individual ITP pursuant to ESA Section 10 for the applicant’s specific project if take is considered likely (Option 4). Option 4 could be an element of Options 1 or 2, and thereby provide better protection for listed species and applicants alike. Thus, the use of the term *option* is not intended to imply that only one of these approaches must be adopted. Applicants have the option to pursue Section 10 at any time to cover potential Section 9 violations associated with their projects. If the applicant decides not to obtain this coverage, then they increase their liability for Section 9 violations and increased potential adverse effects to T&E species and CH.

The question of whether the “off-ramp” (Option 2) is feasible under current law was discussed. The ESA TWG recommends that ADEQ seek clarification while deciding how to proceed.

### 6.1 Option 1 – Memorandum of Agreement

The MOA provides for an informal process to aid ADEQ in screening for those permits with reasonable potential to affect, to obtain FWS’ views of effects and jeopardy/adverse modification determinations, and provides feedback from FWS earlier in the process but does not replace the formal FWS/EPA comment process for permit applications with reasonable potential to affect listed species. EPA may not waive review of permits with reasonable potential to affect threatened and endangered species, as determined by FWS (40 C.F.R. Part § 233.51(b)(2)).

When ADEQ receives a Section 404 permit application, staff would conduct or review the initial screening for reasonable potential to adversely affect T&E species or CH. To support such screening, the permit applicant could

submit a report that evaluates the likelihood that members of a listed species or CH are present and would be adversely affected by the permitted activity. If no species or CH is present, or a “no-effect” determination is made in the initial review, then ADEQ would proceed with processing the permit. However, if ADEQ requires or would like assistance screening the permit application for potential impacts, then the application would be sent to the FWS for review. The details of this arrangement

would be outlined in an MOA negotiated between ADEQ and FWS. Figure 3 provides a general outline of how this might look in a proposed future state.

### **6.1.1 Benefits**

- It is relatively simple and straightforward.
- After using the screening tools, permits without ESA concerns can be expedited.
- Has been successfully used by other states that have assumed the 404 permitting program.

### **6.1.2 Challenges**

- ADEQ would need to hire biologists and train them to screen permits for ESA concerns
- As there is no federal nexus that would trigger the ESA's Section 7 consultation provisions, IT coverage can only be obtained via an ESA Section 10 ITP, which requires development of an HCP and can take much longer than the current process. However, this is not an issue if members of a species are not present and are unlikely to be taken.
- ADEQ or applicants would risk of Section 9 violations if species are present and would be taken. (Although this could be addressed through the "off-ramp" option, below, or through the objection process, under which the Corps issues the permit.)
- A potential challenge is the cost of funding staff to assist with screening.

## **6.2 Option 2 – MOA Plus "Off-Ramp" (or MOA with Optional Section 7 Process)**

Option 2 is based upon the MOA process outlined in Option 1 but incorporates a provision by which a Section 404 permit could be obtained through a federal agency (Corps or EPA) rather than ADEQ, if the project has a reasonable potential to adversely affect a listed species or adversely affect CH.

While ADEQ would remain as the default Section 404 permitting agency under Option 2, the "federal off-ramp" would provide applicants an opportunity to enter the federal permitting process and address ESA issues via Section 7 consultation. The Option 2 process is illustrated in Figure 4.

Under this option, an applicant would initiate the Section 404 permitting process by submitting an application to ADEQ for initial screening. Should the screening process indicate that the project would result in a reasonable potential to affect listed species and/or CH, the applicant could request that ADEQ forward the application to a federal agency (Corps or EPA). The federal agency would then become responsible for processing the permit, and would enter into the Section 7 consultation process with FWS to ensure ESA compliance (similar to the existing Corps process). The eligibility criteria to enter into the Option 2 process would be defined in an MOA between ADEQ, EPA, FWS, and the Corps.

There are also two approaches to the implementation of the option. In the first, if a BE determines, and ADEQ concurs, that resources protected by the ESA may be directly or indirectly adversely affected by

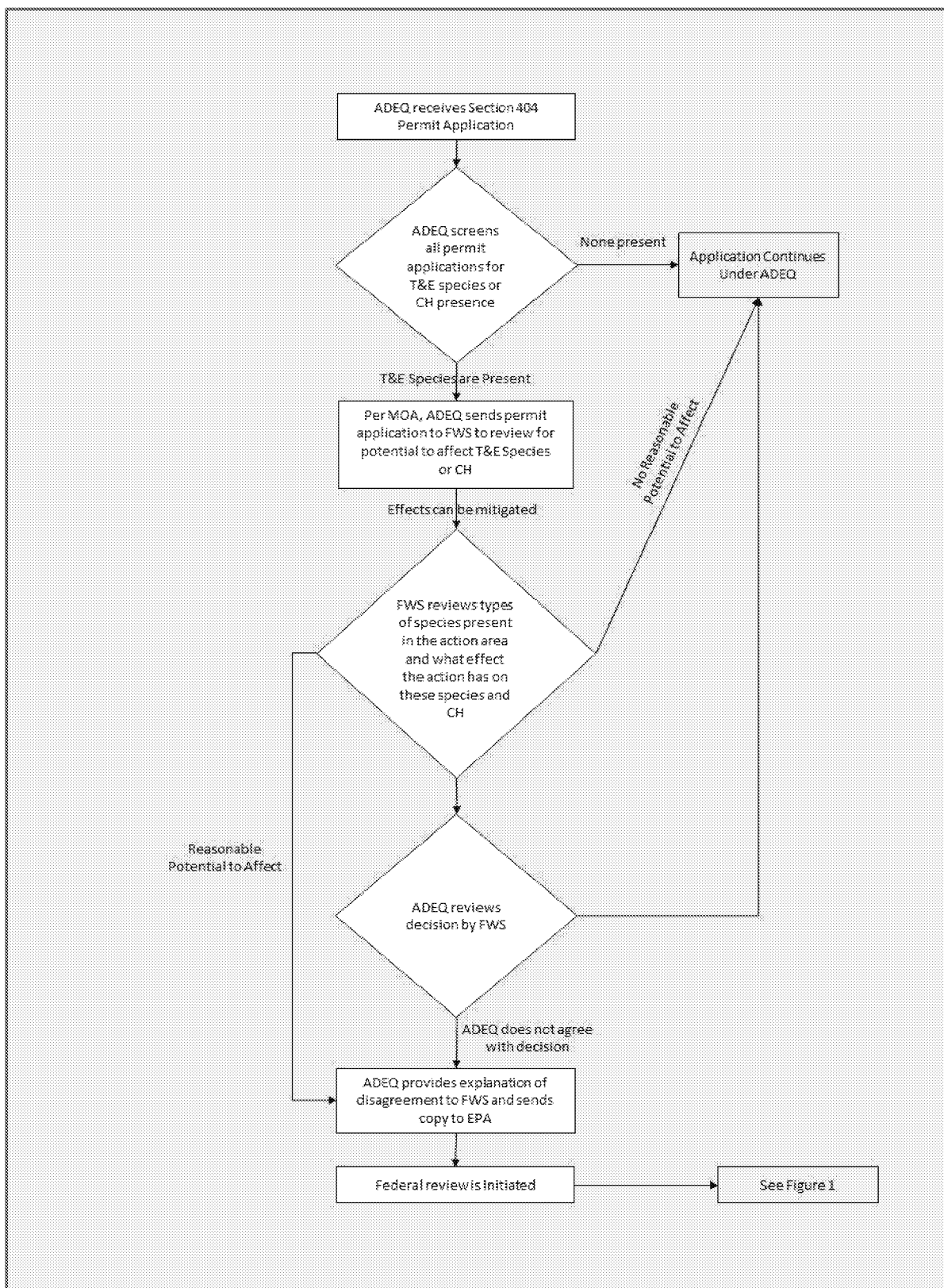


Figure 3. Option 1 – MOA Flow Chart

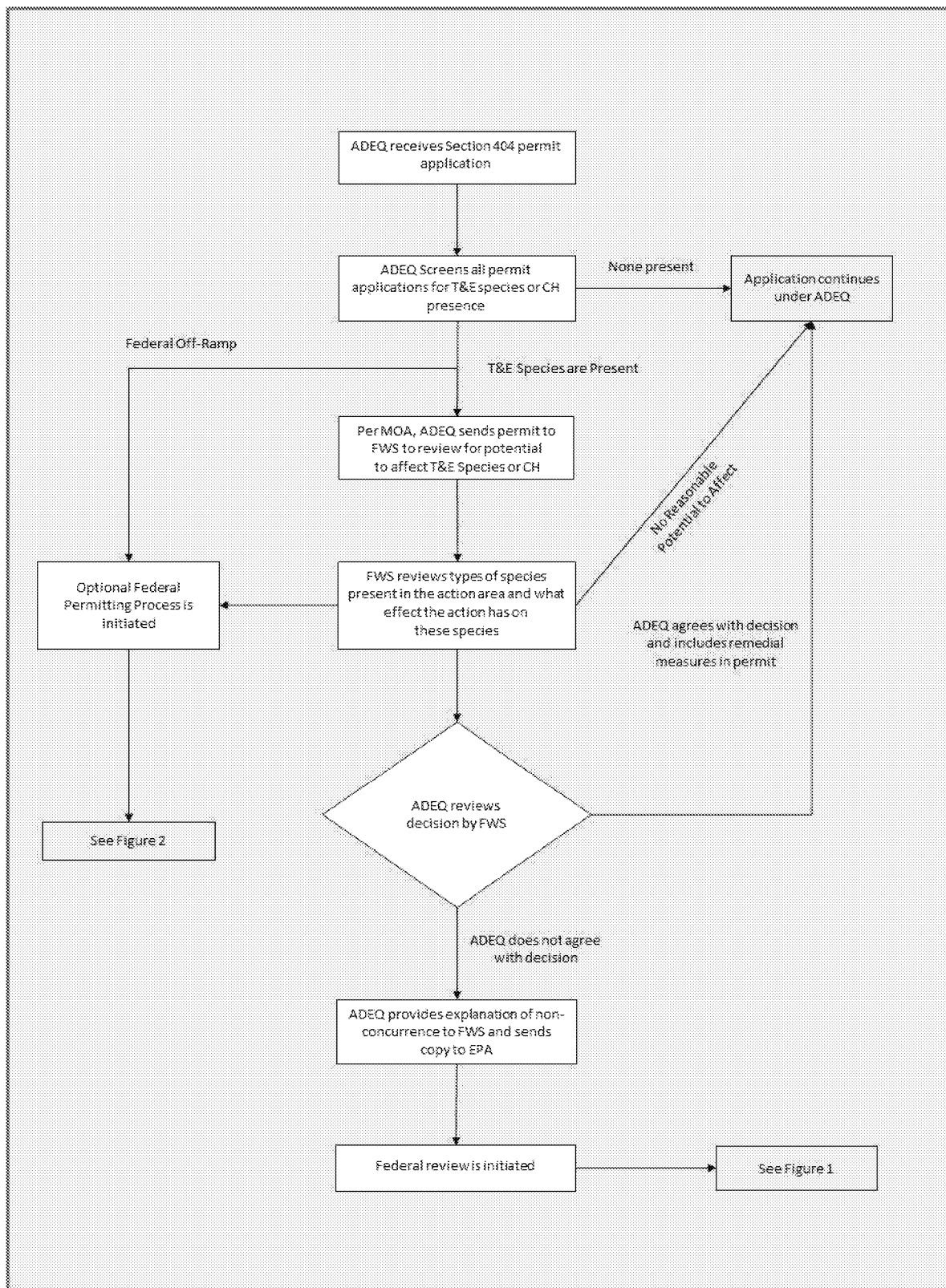


Figure 4. Option 2 – “Off-Ramp” Flow Chart



the proposed portions of the project that are within ADEQ's jurisdiction (the action area), ADEQ would confer with EPA about those effects. If EPA agrees with ADEQ, EPA would initiate informal or formal Section 7 consultation, as appropriate, with the FWS to ensure that the project being permitted will not adversely modify CH or jeopardize the continued existence of a listed species. Any conservation measures proposed by the applicant and/or ADEQ as part of the consultation (now part of the project description on which the consultation is based) and any reasonable and prudent measures and terms and conditions in an IT statement would be incorporated by ADEQ into project permit conditions.

To further refine this concept and to assist EPA, EPA can identify ADEQ in the MOA as their non-federal representative for consultation, as authorized under 50 CFR § 402.08. This would allow ADEQ to be responsible for conducting consultation with the FWS, including data collection and preparation of the BA. This designation would not absolve the EPA from being ultimately accountable for compliance with Section 7 of the ESA. And ADEQ would be required to ensure that the permit properly incorporates any requirements and terms and conditions that are set forth in the BO and that the applicant complies with those requirements and terms and conditions.

While the number of CWA permits that require consultation under Section 7 of the ESA is relatively small, this general approach, if adopted and included in the final MOA between EPA and ADEQ, would preserve the current protections provided by the ESA under the federal CWA Section 404 program. It is important to note that the ESA TWG is uncertain whether this option is legally feasible; we have asked for clarification from the EPA but have received none to date.

### **6.2.1      *Benefits***

- It provides flexibility for projects of varying degrees of ESA complexity.
- ADEQ permitting option provides a single process for projects with no/minimal ESA issues.
- The process provides flexibility for projects where ESA issues become apparent after ADEQ permitting process has been initiated.
- The Corps permitting option provides for formal FWS conclusion regarding jeopardy and adverse modification for projects with known ESA issues.
- The Corps permitting option provides for formal FWS authorization of IT for projects with known ESA issues.
- The Corps has experience permitting complex projects and conducting Section 7 consultation.
- The Corps process may be faster than ADEQ for projects that are complex/have ESA issues.
- The Corps process requires NEPA which provides enhanced public scrutiny, and possibly, greater protections for fish and wildlife and other resources.

### **6.2.2      *Challenges***

- EPA may view the "off-ramp" option as partial assumption which is prohibited by statute.
- There are Issues/uncertainty regarding the Corps scope of action for 404 permitting.

- It may increase overall permitting time if applicant transitions to Corps after initiating ADEQ permit process.
- The Corps process requires NEPA, which can increase scope and result in longer permit timeframes.
- It may require changes to EPA regulations.
- The requirement to comply with NEPA can increase the timeframe significantly depending on the complexity of the project and the significance of expected impacts.
- The Arizona Corps office may need to maintain staff for a small percentage of permit applications that require review.

### **6.3 Option 3 – Statewide Habitat Conservation Plan**

To use this option, ADEQ would apply to the FWS for an ITP in accordance with Section 10(a)(1)(B) and would be responsible for developing the required HCP. The process for this option is outlined in Figure 5. The HCP will specify among other things, the IT expected from permitted activities, the impact this expected take will have on the species as a whole, how the impact will be mitigated, and how those mitigation measures will be funded as dictated by Section 10(a)(2)(A). In addition, because a federal agency issues the ITP, the process is subject to NEPA. Developing an HCP can be a complex endeavor, one that will require ADEQ to make a number of different determinations, each of which may require its own deliberative process.

To develop the HCP, ADEQ would first need to determine the permit area, or the geographic scope of the HCP and resulting ITP. The permit area could include the entire state, certain regions, a single county, or a single watershed. Whatever permit area is chosen would determine which Section 404 permits are covered by the ITP—if the permit area is the entire state, the ITP would cover all Section 404 permits issued in the state. If the scope is regional, specific to individual counties, or individual watersheds, the ITP would only cover Section 404 permits within that geographic scope, and additional HCPs would need to be developed and ITPs issued for any Section 404 permits issued outside the chosen permit area.

ADEQ must also decide which species would be covered in the HCP and ITP, and assess the likely IT of those species that may occur due to the issuance of Section 404 permits. For each covered species, the ADEQ must identify the IT expected to result from those activities. ADEQ would then need to determine, in light of the expected IT, what the expected impact would be on the survival and recovery of each species.

The HCP must demonstrate that ADEQ will minimize and mitigate the IT and expected species impacts to the maximum extent practicable. Mitigation measures can include permanently protecting species habitat, implementing regulations that provide additional protection to covered species, and other conservation measures. ADEQ must commit to implementing these mitigation measures and demonstrate that it has the funding necessary to implement the measures.

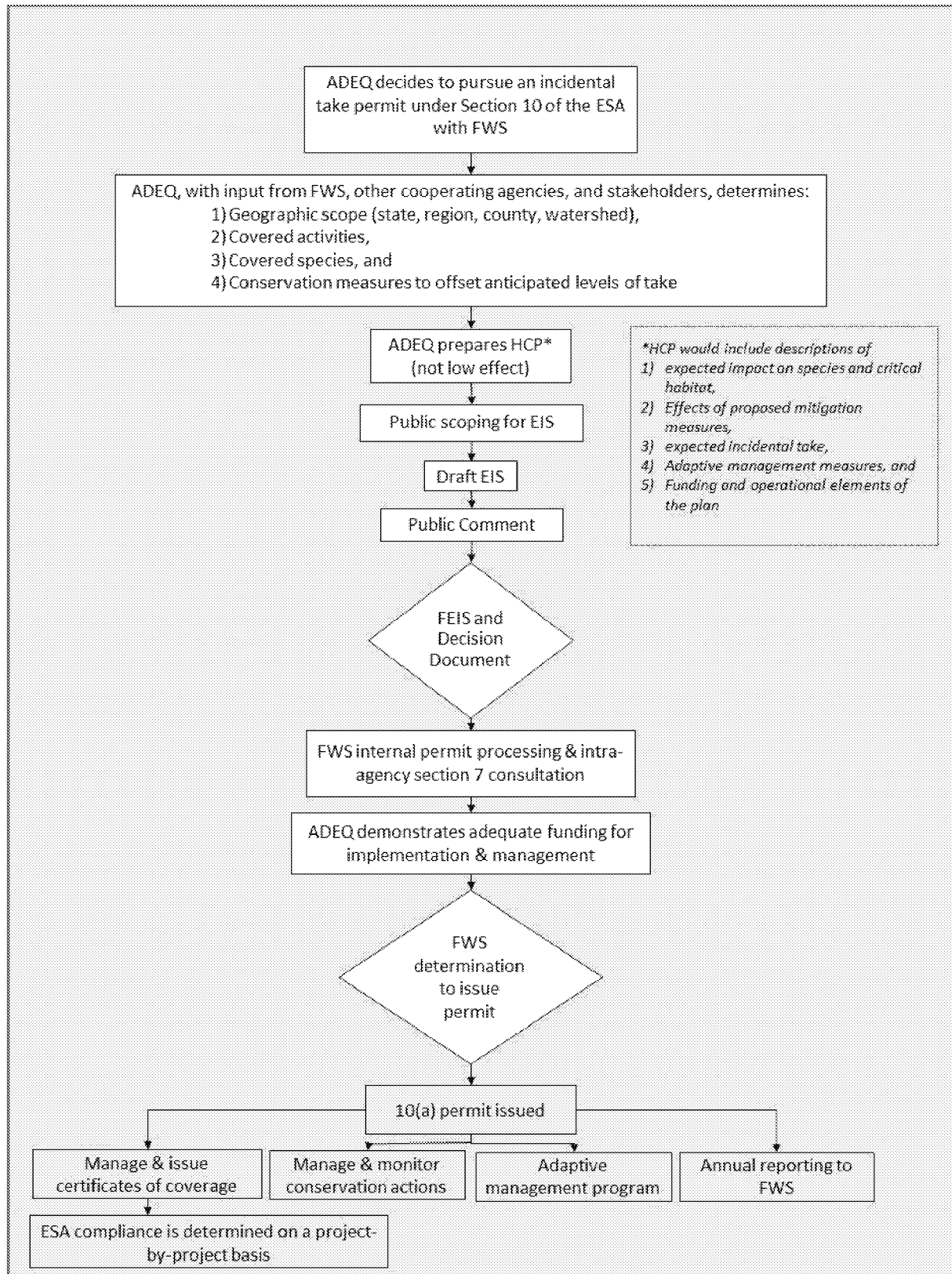


Figure 5. Option 3 – Statewide Habitat Conservation Plan Flow Chart (simplified)

Once all the HCP requirements are met and the ITP is issued, ADEQ can then issue 404 permits within the defined ITP permit area and no additional federal review would be required for those permits, as any potential to affect threatened or endangered species covered under the ITP will have been eliminated, and the Section 404(b) guidelines prohibiting the issuance of permits that may jeopardize listed species or adversely modify CH will have been satisfied.

### **6.3.1 Benefits**

- An HCP would protect ADEQ and Section 404 permittees against ESA Section 9 liability.
- An HCP would provide for robust species conservation in Arizona.
- An HCP would provide regulatory certainty for ADEQ and 404 permit holders.
- FWS cannot require ADEQ to provide any additional conservation beyond what is already provided in the approved HCP, i.e., “No Surprises” policy.
- An HCP would require NEPA which provides enhanced public disclosure and input and, possibly, greater protections for fish and wildlife and other resources.

### **6.3.2 Challenges**

- Developing a large-scale HCP is a significant undertaking that can take a very long time (10–20 years) For example, it took Pima County over 17 years to develop their Multi-Species Conservation Plan (a variation of an HCP) and receive their Section 10 permit. The process began in earnest in 1999 and the permit was issued in 2016.
- Approval of an HCP can take a long time due to the complexity of developing an HCP, need for public involvement, and FWS being understaffed and under-resourced.
- There are additional costs associated with obtaining the ITP for the permittee, such as funding mitigation activities, funding and operational elements of the plan, and public participation process. (There are opportunities to receive federal monies to offset the cost for the process under ESA Section 6).
- The requirement to comply with NEPA can increase the time frame significantly, depending on the scope of the HCP and the significance of the expected impacts.
- Funding adequate mitigation measures can be a challenge.
- New state legislation and/or regulations may be required to meet mitigation requirements.

## **6.4 Option 4 — Project-Specific Habitat Conservation Plan**

This option is largely identical to the statewide option described in Option 3; however, under this option, the permit applicant would apply to the FWS for an ITP and would be responsible for developing an HCP for a specific project/property. A flow chart detailing this process is included as Figure 6. The permit area would be limited to the specific project area outlined in the Section 404 permit application, unless the applicant chooses, in consultation with FWS, to pursue an ITP for a larger permit area beyond what is subject to a Section 404 permit.

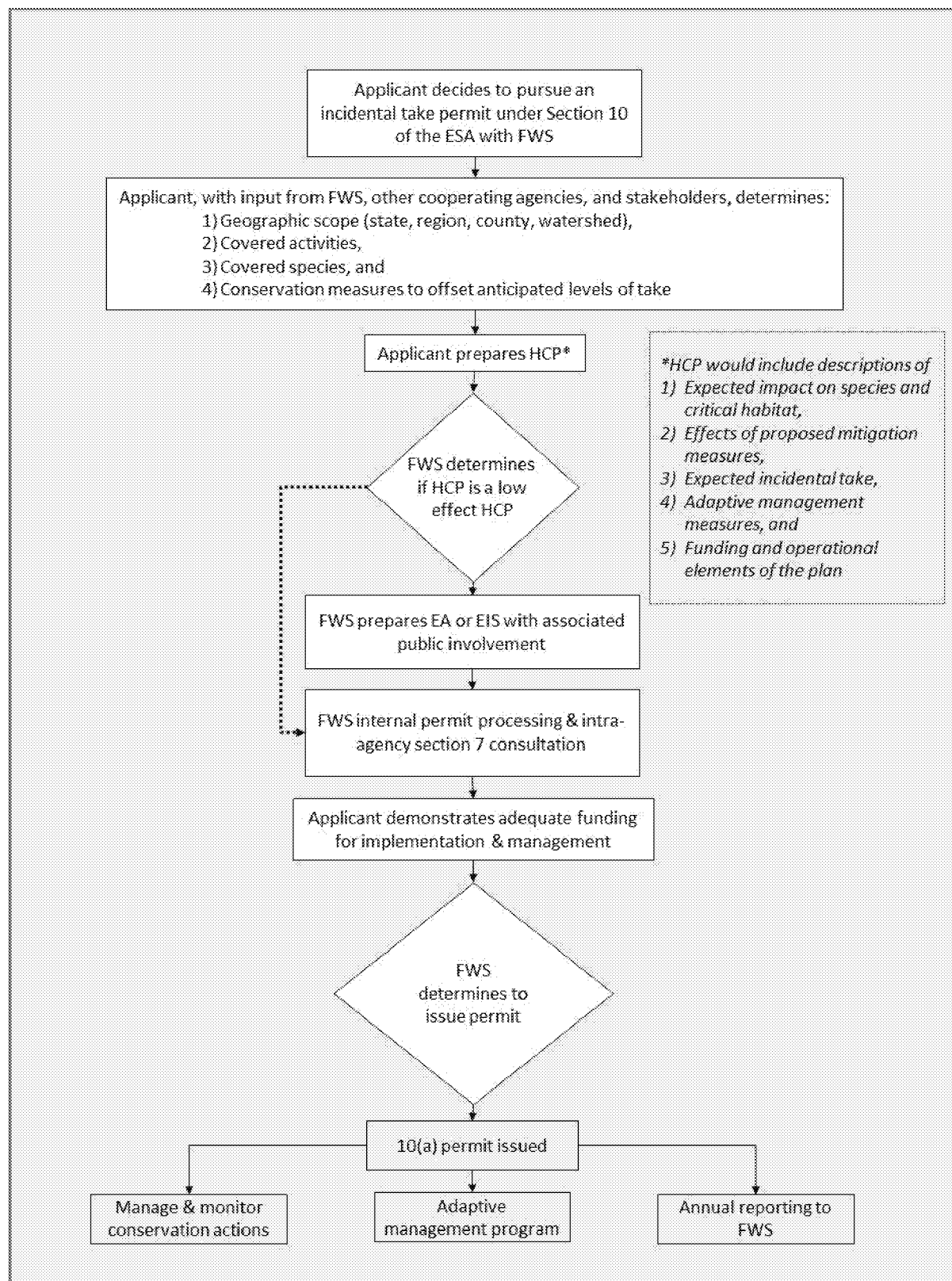


Figure 6. Project-Specific Habitat Conservation Plan Flow Chart (simplified)

The permit applicant would be responsible for determining the species covered by the ITP, the activities covered by the ITP, the take expected to occur as a consequence of those activities, and the expected impact this take would have on the survival and recovery of the species. The permit applicant would also be responsible for developing and sufficiently funding their own avoidance, minimization, and mitigation measures to reduce expected impacts to the maximum extent practicable.

Like Option 3, the HCP developed by the project applicant would be subject to public review and comment as required in the ESA and would also be subject to NEPA, which requires its own public review process. Once all the HCP requirements are met and the ITP is issued, the ADEQ can then issue a Section 404 permit within the defined ITP permit area with no additional federal review required, as the permitted activities will no longer have the potential to affect any threatened or endangered species, and the Section 404(b) guidelines prohibiting the issuance of permits that may jeopardize listed species or adversely modify CHs will have been satisfied.

#### **6.4.1 Benefits**

- A project-specific HCP can take significantly less time than a larger-scale HCP.
- An HCP would protect Section 404 permittees against ESA Section 9 liability.
- An HCP would provide for robust species conservation.
- An HCP would provide regulatory certainty for 404 permittees.
- FWS cannot require the permittee to provide any additional conservation beyond what is already provided in the approved HCP, i.e., “No Surprises” policy.
- HCPs are available to Section 404 permit applicants regardless of the final design of the ADEQ 404 permitting program; anyone can apply for an ITP to protect themselves against Section 9 liability.
- HCPs would require NEPA, which provides enhanced public scrutiny, and possibly, greater protections for fish and wildlife and other resources.

#### **6.4.2 Challenges**

- Approval of an HCP is dependent on FWS staff and resources.
- The requirement to comply with NEPA may increase the timeframe of permit issuance, although the smaller scale of the HCP would, depending on the significance of the impacts, require a less robust NEPA process than a larger-scale HCP.
- The permittee’s cost to prepare and negotiate the HCP with FWS and to complete the other requirements needed to obtain the ITP will be substantial in most cases.
- Funding adequate mitigation measures and other permit requirements can be a significant challenge for individual permittees.

## **6.5 Option 5: MOA and SW HCP**

After reviewing the initial four options, the ESA TWG determined that the options were not mutually exclusive and ADEQ could consider taking elements from various suggestions when considering a future state. This option is a combination of the MOA (Option 1) and Statewide HCP (Option 3) options described above. This allows ADEQ the ability to work cooperatively with EPA and FWS while a statewide HCP is developed. Since benefits and challenges for individual options are listed above, only the additional benefits and challenges are described below:

### **6.5.1 Benefits**

- Since the MOA is relatively simple and straightforward, it can be used in the short term while the longer HCP development process is underway.
- Other states are considering this approach (e.g., this approach was recommended to Oregon (EPA et al. 2014)).
- A MOA and SW HCP would protect ADEQ and Section 404 permittees against ESA Section 9 liability.

### **6.5.2 Challenges**

- It may be expensive to implement 2 different approaches.
- It could take extra time and money to transition from one approach to another.
- Change in philosophy/management from one approach to another.
- Risk of Section 9 violations if species are present and taken before the HCP is in place.

## **6.6 Option 6: Off-Ramp and SW HCP**

Members of the ESA TWG also noted a combination of the "off-ramp" (Option 2) and Statewide HCP (Option 3) options described above as worth investigating.

## **6.7 Benefits**

- Provides flexibility for projects of varying degrees of ESA complexity.
- Once the HCP is in place, ADEQ and permittees would have protection against ESA Section 9 violations.
- The HCP provides robust species protection
- The combination of both options provides regulatory certainty.
- The combination of both options would require NEPA.

## 6.8 Challenges

- ADEQ would need to hire biologists and train them to screen permits for ESA concerns in the short term.
- No IT protection until the HCP is in place for permittees or the state.
- Cost of funding staff to assist with screening in the short term.

## 7 RECOMMENDED PROGRAM

The ESA TWG was not able to agree by consensus and recommend an ideal future program. Members worked to find common ground and to advise ADEQ on the most practical and feasible option available. There were multiple perspectives as part of the ESA TWG due to the diverse members from regulators, non-governmental agencies, municipalities, legal community, and businesses. The ESA TWG felt it was important to provide alternative avenues for projects to get into the Section 7 process to provide IT coverage where needed (i.e., when there is a reasonable potential for “take” to occur to a species listed under the ESA), even though IT protection is not required.

An anonymous survey with two questions was sent out to all ESA TWG members using Survey Monkey. When the survey closed, 14 members provided their responses. Question 1 asked ESA TWG members “which Option Should the ESA TWG Recommend to ADEQ?” Respondents were asked to assign a point value from 1 to 6, with 6 being the most preferred option. If the member did not support the option, a value of 0 was assigned to that option. The results are presented in Figure 7 and Table 2 below.

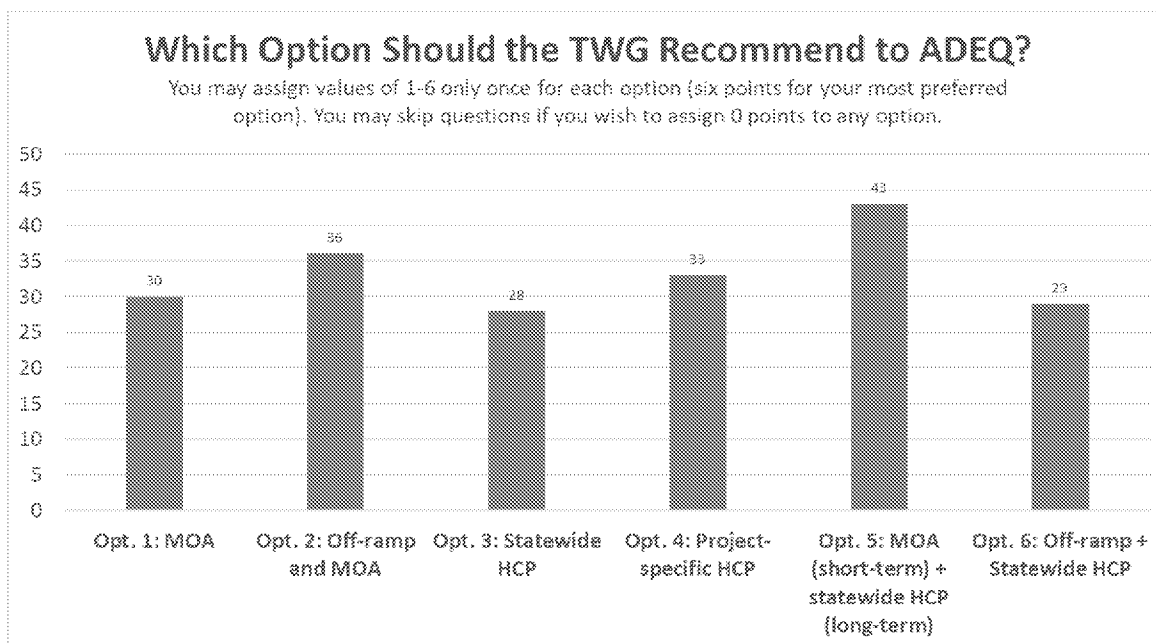




Figure 7. ESA TWG Survey Results for Recommended Options

Table 2. Numeric Survey Results – Recommended Options

Option	Number of responses	1 point	2 points	3 points	4 points	5 points	6 points	Total value
1	8	1	1	3	0	0	3	30
2	10	2	3	0	1	0	4**	36
3	9	2	1	2	3	0	1	28
4	9	2	1	0	2	3	1	33
5	9	0	0	1	2	4	2	43*
6	8	0	2	3	0	2	1	29

Results are as follows:

- \*Option 5 (43 points), the MOA + statewide HCP had the highest score and two respondents preferred it the most. It was also many respondent's 2nd and 3rd choices.
- \*\*Option 2 (36 points), the MOA + Off-ramp, received the second highest score, and had the most votes for 1st place.
- Option 4 (33 points), Project-specific HCP, ranked third highest score with four votes for 1st or 2nd place.
- Three respondents preferred Option 1 (30 points), the MOA option, the most.
- Option 6 (29 points), Off-ramp + statewide HCP, included three votes for 1st or 2nd place.
- Option 3 (28 points), the statewide HCP, had the lowest score, and only one ESA TWG member selected it as first choice.

Question 2 asked ESA TWG members: "Do you support ADEQ assumption regarding ESA issues?" Respondents were asked to select as many options as they wished or skip the question. The results are presented in Figure 8 and Table 3 below. Not only was there no consensus on the option to recommend, but the TWG members did not agree whether ADEQ should take over the administration of the Section program from EPA.

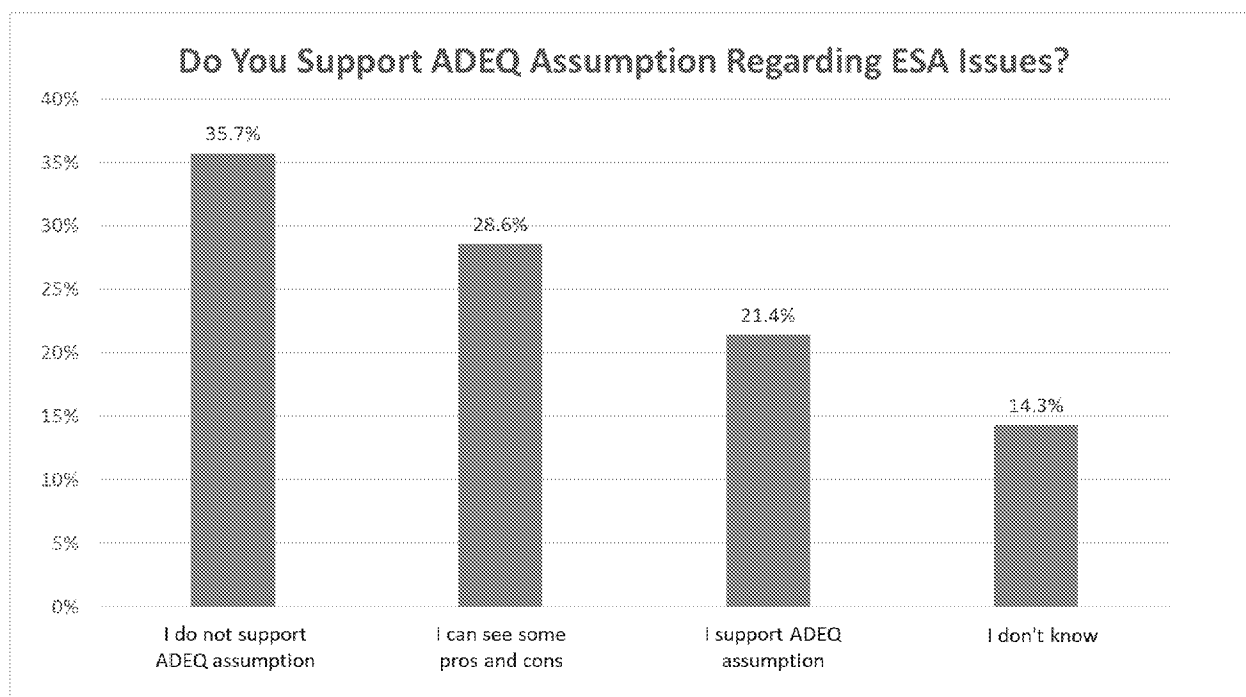


Figure 8. Support of ADEQ Assumption

Table 3. Numeric Results – Support of ADEQ Assumption

Answer Choices	Number of Responses	Percentage of TWG
I do not support ADEQ assumption	5	35.7
I can see some pros and cons	4	28.6
I support ADEQ assumption	3	21.4
I don't know	2	14.3

## 8 GAP ANALYSIS

Before the ESA TWG could envision options for a future state, the committee outlined several key components of ESA protections at the federal level versus what those same components would look like at a state level. The results of those comparisons are outlined in Table 4 and became the foundation for the TWG's gap analysis.

**Table 4. Comparison of ESA Protections: Federal 404 Program vs. State Assumption of CWA Section 404 Permit Authority**

ESA Protection	Federal Program	State Program
<b>Species Protection – Listed Fish and Wildlife</b>	<p>Protected by the prohibitions against take of fish and wildlife that are provided by Section 9 of the ESA.</p> <p>Section 7 consultation between Corps and FWS is required if Corps determines that the federal Action May Affect and is Likely to Adversely Affect a listed species or May Affect, but is Not Likely to Adversely Affect a listed fish or wildlife species.</p> <p>During Section 7 consultation FWS would first determine whether the action would take any listed animal species. If take is expected, then FWS would identify reasonable and prudent measures to minimize take and issue terms and conditions for the authorization of that take. FWS would also make a formal jeopardy determination.</p> <p>Activities outside the Corps permit area expected to result in take of a listed fish or wildlife species would require the applicant to obtain an ITP under Section 10 of the ESA to avoid violation of the Section 9 prohibitions.</p>	<p>Absent a discretionary federal nexus, Section 7 consultation is not available to the applicant to secure coverage for IT.</p> <p>Prior to the issuance of a dredge and fill permit, the state would determine whether the discharge into WOTUS has “reasonable potential for affecting endangered or threatened species” as determined by FWS.</p> <p>All permits are forwarded to EPA, except for classes of permits for which review has been waived per 40 C.F.R. § 233.50(a)(1).</p> <p>If the state believes that issuance of the permit may have reasonable potential for affecting listed species, it is required to forward that permit to the EPA for federal review.</p> <p>ADEQ must develop a process by which they determine which permit applications must be sent to the EPA for this review.</p> <p>For applicants whose activities are anticipated to result in take of any listed animal would have the option of obtaining an ITP Permit under Section 10 of the ESA to avoid violation of the Section 9 prohibitions.</p>
<b>Species Protection – Listed Plants</b>	<p>Take prohibitions of Section 9 do not apply unless the activity would be in violation of state or local regulations or would occur on federal lands.</p> <p>Within Corps permit area Section 7 consultation between Corps and FWS required if Corps issues a May Affect, Likely to Adversely Affect (formal Section 7 Consultation) or May Affect, Not Likely to Adversely Affect (informal Section 7 Consultation). FWS makes a jeopardy determination, but there is no IT permit and thus no reasonable prudent measures or terms and conditions for take.</p> <p>No need for Section 10 permit for potential effects outside of Corps Permit Area.</p>	<p>Take prohibitions of Section 9 do not apply unless the activity would be in violation of state or local regulations or would occur on federal lands.</p> <p>Section 404(b)(1) guidelines require that ADEQ considers impacts to listed plants.</p> <p>No need for a Section 10 permit.</p>

ESA Protection	Federal Program	State Program
<b>Critical Habitat</b>	<p>Critical habitat is provided protection within the Corps permit area and its presence coupled with the potential for adverse effect (may affect or may affect not likely to adversely affect determination) triggers Section 7 Consultation (formal or informal).</p> <p>FWS in their Section 7 consultation makes a determination as to whether the activity would result in the destruction or adverse modification of CH. A destruction or adverse modification determination requires identification by the FWS of reasonable and prudent alternatives that would avoid adverse modification.</p> <p>A Section 10 permit is not available or required for CH.</p>	<p>Project impacts to CH are subject to FWS review and evaluation per Section 404(b)(1) guidelines.</p> <p>EPA retains oversight authority over ADEQ's determination (40 C.F.R. 230.10(b)(3)).</p> <p>A Section 10 permit not available or required for CH.</p>

## 9 GAP CLOSURE OPTIONS

The TWG considered species protection and IT coverage as the most important pieces of each option. The best way to close the gap between what the current and future state is to provide the highest level of species protection with IT coverage in the most efficient, shortest, and most economical way possible. For several members of the ESA TWG, maintaining an equivalent level of federal review was also important. For them, the NEPA public review process was an important component of the federal nexus that would be lost when ADEQ assumes the program.

## 10 MINORITY OPINION

### SIERRA CLUB AND MARICOPA AUDUBON SOCIETY

At present, when a project may involve a threatened or endangered species, NEPA and Section 7 of the ESA apply because the Corps' role constitutes a "federal action." An ideal future would address ESA issues through Section 7 consultations. Compliance using other ESA sections promises to be slower and will offer less protection to applicants for ITs. The EPA, in discussions about Section 404 assumption with other states, consistently maintains that assumption ends a federal nexus. Thus, NEPA would no longer apply, and ESA Section 7 consultation is not permissible.

The "off-ramp" alternative seeks to satisfy this concern by assigning applications with ESA issues to the Corps, thus restoring "federal action." Because regulations prohibit partial assumption of Section 404, it appears unlikely that EPA will accept an off-ramp approach.

Moreover, Arizona lacks state statutes equivalent to NEPA and ESA. New Jersey and Michigan, the only states to assume Section 404 authority, have state statutes comparable to these federal laws. Moreover,

they also have state wetland protection programs in place. Florida, another state actively pursuing Section 404 assumption, has also enacted endangered-species protection. These states can build on prior experience with endangered species and professional expertise from enforcing state statutes. ADEQ has not had the same opportunity.

Thus, we have concluded that because: 1) Arizona lacks laws comparable to NEPA and ESA, 2) NEPA will not apply without a federal nexus, and 3) uncertain, cumbersome procedures under other ESA sections will replace Section 7 consultation, species protection equivalent to the current program is not achievable. Thus, Arizona should not assume Section 404 authority; rather, it should remain with the Corps.

### **WESTLAND RESOURCES, INC.**

An ongoing point of concern of numerous members of the ESA TWG is the potential loss of the substantive protections provided by Section 7 of the ESA. Much of the group's conversations have revolved around that loss; the potential loss of some of the protections for some listed resources (i.e., CH and plants); and the ability of permit applicants to obtain IT authorization through the Section 7 consultation process, without having to go through the Section 10 permit process.

Our discussions have focused on alternative solutions. One of these options has been characterized as an "off-ramp" from the state process (Option 2). In Option 2, where there is the potential for a project to adversely affect members of a listed species, the project could be federalized and Section 7 consultation would occur. The discussion that follows is focused on an alternative solution that is a variation of that Option 2 theme and is based upon EPA's retention of discretionary authority over individual projects after ADEQ assumption of the Section 404 permit program in Arizona.

Westland Resources' opinion is that while the right of a State to assume Section 404 permitting responsibilities is not a discretionary decision on the part of EPA, EPA nevertheless does retain discretionary authority over state permitting requirements after state assumption (see 40 CFR Pt. 223, Subpart F (EPA regulations governing federal oversight)). Specifically, on a project-specific basis, if ADEQ does not satisfy an EPA objection or requirement for a permit condition and does not deny the permit, the project will be federalized, and the Corps is required to process the permit (50 CFR § 233.50(j)). Therefore, through their ability to federalize a project if their objections to the permit are not satisfied, EPA is retaining a discretionary authority over project permits. Note that EPA's discretionary oversight authority does not undermine program assumption by ADEQ; therefore, this does not run afoul of the "partial" assumption problem.

The retention of a discretionary authority by EPA after delegation provides an option to simply develop an "off-ramp" or reliance on Section 10 of the ESA for ESA compliance. The implementation of this option also would be codified in the MOA between ADEQ and EPA. There are also two approaches to the implementation of the option. In the first, if a BE determines, and ADEQ concurs, that resources protected by the ESA may be directly or indirectly adversely affected by the proposed portions of the project that are within ADEQ's jurisdiction (the Action Area), ADEQ would confer with EPA about those effects. If EPA agrees with ADEQ, EPA would initiate informal or formal Section 7 consultation, as appropriate, with the USFWS to ensure that the project being permitted will not adversely modify CH or jeopardize the continued existence of a listed species. Any conservation measures proposed by the applicant and/or ADEQ as part of the consultation (now part of the project description on which the

consultation is based) and any reasonable and prudent measures and terms and conditions in an IT statement would be incorporated by ADEQ into project permit conditions.

To further refine this concept and to assist EPA, EPA can identify ADEQ in the MOA as their non-federal representative for consultation, as authorized under 50 CFR § 402.08. This would allow ADEQ to be responsible for conducting consultation with the USFWS, including data collection and preparation of the BA. This designation would not absolve the EPA from being ultimately accountable for compliance with Section 7 of the ESA. And ADEQ would be required to ensure that the permit properly incorporates any requirements and terms and conditions that are set forth in the BO and that the applicant complies with those requirements and terms and conditions.

While the number of CWA permits that require consultation under Section 7 of the ESA is relatively small, this general approach, if adopted and included in the final MOA between EPA and ADEQ, would preserve the current protections provided by the ESA under the federal CWA Section 404 program.

## **11 IMPLEMENTATION CONSIDERATIONS**

Depending on the option or the channel used by ADEQ to assume the Section 404 program, any number of tools, resources, and processes will need to be obtained, implemented, or developed. The following is a list that was developed to the best of the ESA TWGs ability for ADEQ to assist in the creation of a successful program.

The TWG is not suggesting that all of these agreements and authorities must be obtained to appropriately implement the program.

### **11.1 Agreements / Interagency Cooperation**

- MOA with FWS
- MOA with EPA
- MOA with Corps
- MOA with AZGFD
- Maintain Section 7 level of consultation to meet requirements of Sec 404(g) of the CWA
- Create a Transfer Plan for ADEQ, Corps, and FWS to include agency responsibilities
- Clearly define agency authorities and level of involvement concerning ESA issues.
- Ensure no conflicts of interest with ADEQ as the permitting authority.
- Quarterly meetings between ADEQ and FWS to check how applications are being evaluated.
- Effectively use local and tribal agencies: knowledge and concerns regarding ESA issues.

## 11.2 State Authority

- Develop a State Wetland Program, including the development of buffers and tiered rating system. The program could provide wetland protection through regulatory and non-regulatory provisions. In Arizona, riparian areas are included in the definition of wetlands.
- Consider creating a State Endangered Species Program with rules and regulations.

## 11.3 Training Programs

- ADEQ works closely with FWS to develop training and provide this training to ADEQ staff so permit applications are processed with efficiently and minimizes negative impacts to listed species.
- Hold outreach events, public meetings and announcements and address Section 404 permit process before any changes take place.
- ADEQ and FWS develop guidance and other available resources regarding ESA to be posted on ADEQ website. Provide the website address of the resources page on applications.
- Inform current and future permittees of process changes and transitional deadlines, as well as the handling of current applications moving forward.
- Establish clear and concise applicant instructions, and guidance documents on completing the application process. ADEQ should provide online resources to limit confusion and improve compliance.

## 11.4 Screening Analysis Tools

### 11.4.1 *Arizona Heritage Data Management System*

All land and water development projects in Arizona requiring federal environmental documentation, such as an Environmental Assessment or Environmental Impact Statement, must be submitted to the AZGFD as part of the environmental review process. The AZGFD analyzes each project for wildlife that may be affected by the project. This includes species on the FWS Endangered and Threatened species lists, as well as those on the AZGFD's Species of Greatest Conservation Need. The free, Web-based, Heritage Data Management System, or Online Environmental Review Tool (ERT) generates a list of species potentially affected within a project area, alerts about potential permits, and gives project type and species-specific recommendations to minimize impacts or suggest avoidance measures. The ERT satisfies Phase I Environmental Compliance with NEPA. The ERT can be found at <https://azhgis2.esri.com>.

### 11.4.2 *Information for Planning and Consultation*

The IPaC tool is a currently live application that applicants can use for the screening process to determine whether overlap of the action area and species occurrence or habitat occurs. Applicants input their project specifications to get information on what species *may* be within their action area. The tool

also provides information on what impacts to species might occur, and what conservation measures can be considered to minimize impact. The IPaC Resource List also provides electronic links to the Environmental Conservation Online System profiles for the species that may be within the action area for applicants to understand habitat and resource needs from the species. IPaC can generate an official species letter, but this letter is not considered consultation and does not provide IT coverage.

## 11.5 Staffing

ADEQ may consider obtaining T&E species expertise in-house or elsewhere through MOAs with the AZGFD and/or the FWS.

For example, AZGFD could provide initial permit screening for T&E species and CH overlap. The AZGFD employee would review all permits that potentially affect threatened and endangered species and CH to ensure there are no adverse effects. Also, an AZGFD biologist that is proficient with ESA regulations and policies could review a subset of 'no effect' permits for compliance and screen draft projects that could potentially affect threatened and endangered species and CH and coordinate with FWS for review and permit conditions.

Or, ADEQ could consider funding one full-time employee at FWS to work exclusively on ADEQ 404 permit reviews. The employee would be responsible for a variety of tasks, including training ADEQ employees, writing a manual for ADEQ on how to review permits, and developing a list of standard species-specific permit conditions. If there are adverse effects, the FWS biologist would coordinate with ADEQ and the FWS species leads to develop individual permit conditions to protect species and habitats. The biologist would also be responsible for coordinating with EPA on permits with adverse effects that cannot be avoided.

Based on discussions with Michigan's and New Jersey's FWS offices, the FWS spends a lot of time the first 3 to 5 years training their respective department of environmental quality staff to review permits at the same level an FWS biologist would review them. Funding a full-time biologist at the FWS would ensure that permit review time frames are consistently met. If ADEQ decides to apply for a statewide Section 10 permit, the FWS biologist would lead its development, which could take 10 to 20 years. Individual permittees may also apply for Section 10 permits, which could take 2 to 3 years to develop.

ADEQ could periodically review permitting statistics to evaluate the need to fund an ESA specialist.

## 11.6 Enforcement and Compliance

- ADEQ will need to develop outreach materials that explain the following requirements for 404 applicants.
- Requirements for annual reporting by permittee for 5 years
- Requirements by applicants for annual reporting
- Enforcement Notice of Correction, Notice to Correct, Notice of Violation rules and regulations



## **11.7 Process Improvements**

The ESA TWG suggests that ADEQ develop outreach materials for potential 404 applicants that address the following issues.

- Address ESA and CWA issues before permit issuance.
- Assist agencies in meeting timeline requirements for comments, recommendations, and completion of technical documents.

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## **APPENDIX A**

### **ENDANGERED SPECIES ACT TECHNICAL WORKING GROUP CHARTER**



## **Endangered Species Act Technical Working Group Charter**

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The Arizona Department of Environmental Quality Water Division has formed Technical Working Groups (TWGs) to assist the Department in developing a program to assume Clean Water Act (CWA) 404 permitting for Arizona. Each TWG will operate according to this Charter.

In implementing its mission to protect and enhance public health and the environment, ADEQ strives for radical simplicity, nationally recognized technical and operational excellence, and balanced, leading-edge environmental protection. Please allow this vision to guide the workgroup's recommendations developed under this Charter.

### **ROLE OF THE PANEL**

The panel will meet regularly to review and discuss the assigned objectives. In addition, the TWG will:

- Provide monthly updates on work status to the CWA 404 Executive Committee.
- Report and seek additional input on work products at regularly scheduled stakeholder meetings.
- Provide a white paper with final recommendations by December 20, 2018.
- Once the group has completed the white paper it will be disbanded.

The TWG is a voluntary working group which will make recommendations to the CWA 404 Executive Committee. Neither the group nor individual members will be asked to make decisions on behalf of ADEQ.

### **MEMBERSHIP**

Members of the TWG were chosen from more than 115 stakeholders who voluntarily applied to assist ADEQ in developing the CWA 404 Program. Membership selections were made by ADEQ based on the technical areas of expertise, geographic and special interest diversity and willingness to participate.

This is a voluntary advisory working group. Members are expected to treat each other with mutual courtesy, respect and dignity. If either the ADEQ Water Quality Director or the chair are concerned about the commitment, behavior, or performance of a workgroup member, the two shall consult to determine appropriate action, which may include replacement of the member. Members may withdraw at any time.

### **LEADERSHIP**

ADEQ selected a Chair from the stakeholder applicants. The Chair will be responsible for providing updates to the CWA 404 Executive Committee and working with ADEQ contracted

## Endangered Species Act TWG Charter

staff to prepare meeting agendas. At the first meeting, TWG members will select a Vice Chair to lead the group in the absence of the Chair.

Meetings may be facilitated by the Chair or the TWG may use a third-party facilitator to assist in keeping the meetings on track to enable the Chair to participate more fully in technical discussions. Summary meeting notes will be prepared by ADEQ contracted staff.

The Chair is responsible for the following:

- Establishing a workgroup timeline
- Moving the discussion forward to keep the agenda on time
- Ensuring that the workgroup remains productive
- Ensuring that all sides of an issue are explored, including hidden or unpopular aspects
- Encourage participation
- Assist the workgroup in reaching consensus and articulating issues where consensus is not possible
- Assist workgroup members in preparing the deliverables
- Ensure that workgroup deadlines are met, and the final report is delivered to ADEQ on schedule

## MEETING FORMAT

The format of the meetings will be determined by the TWG members. Technical support and information will be provided as needed by ADEQ staff. Only TWG members will be notified of work group meetings. These are working meetings and will not include an open call for public comment. Stakeholder meetings will be held in the fall so that all stakeholders and public can receive updates on work group discussions and provide additional input. Also, TWG agendas and meeting notes will be posted on the ADEQ website.

## DECISIONS/CONSENSUS

Ideally, the workgroup will be able to operate on a consensus basis. If a consensus cannot be reached, to move forward, decision will be by a quorum of 50% + 1 of the members (which may include telephonic attendance).

For the sake of the record and to make certain that ADEQ fully understands all sides of the issue, the chair will ensure that the dissenting voters provide a written explanation of the reasons for disagreement. These explanations will be included in the final deliverable of the workgroup.

## MEETING SCHEDULE

At the first TWG meeting, the members will establish a meeting schedule sufficient to complete the objectives by the stated deadline. ADEQ will provide contracted staff to assist in scheduling meetings, preparing agendas and meeting notes, and communication with members. Meeting space will be available at ADEQ. As needed ADEQ will provide WebEx and conference calls for TWG meetings.

Endangered Species Act TWG Charter

## MEETING ATTENDANCE

ADEQ recognizes and appreciates that workgroup members are experts in their field and are volunteering their valuable time. It is expected that workgroup members will participate in good faith throughout the process. Members should make every effort to attend all meetings in person or electronically. Members represent their affiliations and bring their special expertise to the table. Full participation is needed to ensure all affiliations and expertise are represented, all viewpoints are voiced, and decisions are reached by consensus to the maximum extent possible. Members may send a "proxy" if they are unable to attend a meeting. The member must fully brief the proxy prior to the meeting. The proxy may not ask the TWG to reconsider a previous decision or open new discussions on previous issues. Members who are unable to participate on a consistent basis may be asked to relinquish their position on the TWG.

## MEDIA REQUESTS

The Technical Working Group chair and members may refer any media requests regarding ADEQ's assumption of CWA § 404 or the workgroup process to ADEQ's Public Information Officer, Erin Jordan, should they choose. Each workgroup member agrees that if contacted by the media or any organization to answer questions or asked to speak at an event, they will not present themselves as representing ADEQ in any way. Contact information for Erin Jordan is as follows:

Phone: 602-771-2215

Email: [Jordan.Erin@azdeq.gov](mailto:Jordan.Erin@azdeq.gov)

## COORDINATION WITH OTHER STATES

ADEQ hopes that workgroup members will research programs in other states as a part of their analyses. If there are questions that workgroup members must ask these states (e.g. New Jersey or Michigan), please confer with ADEQ staff to coordinate communication with said states.

## OBJECTIVES

The Technical Working Group will conduct meetings and work collaboratively to accomplish the following objectives.

## ENDANGERED SPECIES ACT WORK GROUP OBJECTIVES

Questions:

- What is the current state?
  - What are the specific benefits and problems of the current state process?
- What is the ideal future state for implementing endangered and threatened species protection requirements? Why is this the ideal future state?
  - Note: Future state recommendations should provide equivalent protection of WOTUS as the existing Corps program.
- Identify the gaps between the current state and the ideal future state.



Endangered Species Act TWG Charter

- Provide gap closure options to enact the future state (i.e. what entities involved, what agreements, rules, other law may be necessary to enact future state— Note: this does not contemplate modifying federal law)
  - Why are each the best options?
  - What are the potential obstacles to implementing each gap plan options?
- In addition to the descriptions, please provide a flow chart or other visual representation of each of the above, if possible.

Recommended Structure:

- Introduction
- Description of current state (positives and negatives)
- Description of ideal future program under the State/elements (& why is this ideal?)
- Identify and explain the gaps between current state and future state Arizona program
- Identify and explain gap closure options (including explanations and why they're good options)
  - Brief intro description
  - Table summary of options
  - Separate headings for each option to discuss each fully, including benefits and drawbacks
  - E.g. Option XYZ
    - Description
    - Benefits of Option XYZ (also perhaps compared to other options)
    - Drawbacks/obstacles to each gap option (also perhaps compared to other options)

(Please provide visual representations of the above, where helpful for understanding, especially regarding process.)

Please consider and discuss the following items in your workgroup deliberations:

- General considerations:
  - Tools, resources, & processes ADEQ needs to effectuate program (resources in house [e.g. computer programs, information access] &/or externally [e.g. AZ Game and Fish])
  - Tools or information ADEQ needs from permittees
  - Tools or resources permittees need from ADEQ
  - Existing limits on state authority (including, but not limited to, A.R.S. § 41-1030 and A.R.S. § 41-1001.01)
  - Methods for a smooth transition to the State program
  - Ensuring quality environmental protection in a timely manner in the future state
  - Ensuring clarity, predictability, and certainty for all parties
  - How to ensure adequate environmental review when NEPA not required
  - General Permits and Individual permits
  - Risks to the environment
  - Risks of disruption to the permit approval/disapproval process

Endangered Species Act TWG Charter

- New Jersey and Michigan processes as these are the only two states with approved 404 programs; Florida may also have insight as they have been looking into ESA issues in their pursuit of assumption
- Litigation risks to all parties
- Future Corps and EPA involvement
- Endangered Species Act specific considerations:
  - 40 CFR § 230.10(b)(3):

“No discharge of dredged or fill material shall be permitted if it.....Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended. If an exemption has been granted by the Endangered Species Committee, the terms of such exemption shall apply in lieu of this subparagraph”
  - Endangered Species Act (16 U.S.C. § 1531 et seq.)
  - Number of threatened and endangered (T&E) species in Arizona
  - Likelihood of a project adversely affecting a T&E species in Arizona (perhaps in comparison to Michigan and New Jersey, to understand how our future state process may compare to those other approved programs)
  - Federal nexus project scope – would it always align with 404 project scope? If federal nexus, is the ESA analysis always going to apply to 404 projects? (e.g. project on forest service land v. some other federal project nexus)

## **APPENDIX B**

### **ENDANGERED SPECIES ACT TECHNICAL WORKING GROUP RESEARCH SUMMARY**

Water Quality Division Clean Water Act / Section 404  
Technical Working Group: Endangered Species Act  
Research Summary

State	Did State Assume Section 404 (Yes or No)	Does the state have local / ESA Regulations?	Does State Wildlife Agency Conduct Initial Review?	Does state have local wetland regulations?	MOAs in Place? (If yes, include agencies)	What led to the ultimate success or failure of the assumption?
Florida	No	Yes		Yes	Underway	
Michigan	Yes -- 1983	Yes -- Department of Natural Resources  Natural Resources and Environmental Protection Act 451 of 1994 Part 365 Endangered Species Protection	Yes - State nongame wildlife staff screen applications for potential impacts to T&E species and coordinate with USFWS. This is done early even if a public review is not required.	Yes - Part 303 of the Michigan Natural Resources and Environmental Protection Act (NREPA), entitled Wetlands Protection AND Part 301 of the NREPA, entitled Inland Lakes and Streams	-1977 (USACE Joint Permit process) - 1981 USACE enforcement actions and after the fact permitting procedures AND shared staff resources and outreach materials - 1983 EPA MOA - 1984 USACE MOA - 2011 EPA MOA Update	Michigan has a stand-alone law which protects federally listed species in addition to state listed species; State Regulatory Wetland Program; Administered under State Law
New Jersey	Yes - Approved 1993 and in effect 1994	Yes -- New Jersey Endangered Species Conservation Act		Yes - Freshwater Wetland Protection Act	Yes. NJDEP, USFWS, EPA	State was approved in 1993, able to show coordination
Oregon	No	Yes	No	Yes; <a href="https://www.oregon.gov/DSL/WW/Pages/Permits.aspx">https://www.oregon.gov/DSL/WW/Pages/Permits.aspx</a>	No but proposed as Phase 1 of assumption	ESA, tribal concerns, adjacent waters
Virginia	No	Yes	Yes (see Wildlife Action Plan)	Yes	No	General approval of the current process and costs of assumption outweighed benefits

## **APPENDIX C**

### **MEMORANDUM OF AGREEMENT EXAMPLE DOCUMENTS**

Memorandum of Agreement Example Documents



RICK SNYDER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
LANSING



DAN WYANT  
DIRECTOR

November 9, 2011

Ms. Susan Hedman, Regional Administrator  
United States Environmental Protection Agency  
Region 5  
77 West Jackson Boulevard (R-19J)  
Chicago, Illinois 60604-3590

Dear Ms. Hedman:

Enclosed is one signed original of the Clean Water Act Section 404 Program Memorandum of Agreement between the United States Environmental Protection Agency (USEPA) and the Michigan Department of Environmental Quality (MDEQ). We will maintain one signed original in our files.

We look forward to working with the USEPA on Michigan's Section 404 Program. If you have any questions, please contact Mr. William Creal, Chief, Water Resources Division, at 517-335-4176; [crealw@michigan.gov](mailto:crealw@michigan.gov); or MDEQ, P.O. Box 30458, Lansing, Michigan 48909-7958.

Sincerely,

Dan Wyant  
Director  
517-373-7917

Enclosure

cc/enc: Ms. Tinka Hyde, USEPA, Region 5  
Mr. John Konick, United States Army Corps of Engineers  
Ms. Barb Hosler, United States Fish and Wildlife Service  
Mr. Jim Sygo, Deputy Director, MDEQ  
Mr. William Creal, MDEQ

**MEMORANDUM OF AGREEMENT  
BETWEEN THE  
MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY  
AND THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 5  
  
ADMINISTRATION OF SECTION 404 OF THE CLEAN WATER ACT  
BY THE STATE OF MICHIGAN**

This Memorandum of Agreement (MOA) between the Michigan Department of Environmental Quality, hereinafter referred to as the MDEQ, and the United States Environmental Protection Agency, Region 5, hereinafter referred to as the USEPA, defines the federal and state roles in carrying out the policies, regulations, and procedures necessary to administer the permit program established pursuant to Section 404 of the Clean Water Act (CWA), Title 33 of the United States Code, Section 1251 *et seq.*, hereinafter referred to as the "404 Program," and to facilitate program coordination between the MDEQ and USEPA.

WHEREAS, Section 404(g) of the CWA provides for state administration of the 404 Program regulating discharges of dredged or fill material to waters of the United States; and

WHEREAS, the MDEQ has, since 1984, operated a state program in accordance with the requirements of Section 404(g) of the CWA and Title 40 of the Code of Federal Regulations (CFR) Part 233, 404 State Program Regulations; and

WHEREAS, the USEPA has approved the state program pursuant to Section 404(h),

NOW, THEREFORE, IT IS AGREED THAT:

**1) Authorities.**

The MDEQ shall administer and enforce the 404 Program in accordance with those state laws and administrative rules that the USEPA has defined as components of the federally authorized 404 Program in the State of Michigan (40 CFR Section 233.70), and in accordance with the Section 404 State Program Regulations (40 CFR Part 233), the CWA, Section 404(b)(1) Guidelines (40 CFR Part 230, Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material) (404 Guidelines), and provisions contained in this MOA and the agreement between the MDEQ and the United States Army Corps of Engineers (USACE).

**2) Compliance monitoring and enforcement.**

- a) The MDEQ has primary responsibility for compliance monitoring and enforcement provisions of the State 404 Program, and shall take timely and appropriate enforcement action against persons in violation of permit conditions for all permits issued under the State 404 Program, and against persons conducting unauthorized discharges of dredge or fill materials into waters of the United States over which the MDEQ has assumed jurisdiction under the State 404 Program.
- b) The MDEQ shall notify the USEPA of the status of compliance and enforcement actions through submission of an annual report as outlined in paragraph 7 of this MOA.

- c) When a violation is identified by the MDEQ that meets the criteria in paragraph 3 of this MOA -- such that direct review by the USEPA would be required under MDEQ permit processing procedures -- the MDEQ shall initiate coordination with the USEPA. As part of this coordination, at a minimum, the MDEQ shall provide a summary of the unauthorized activity and inform the USEPA of the status of the file as enforcement actions are taken, as well as any decision to accept an after-the-fact permit application.

In the event that an after-the-fact permit application is accepted, the MDEQ shall forward such application to the USEPA, and the USEPA shall, as appropriate, provide comments to the MDEQ. The MDEQ shall consider, and as appropriate incorporate, the comments of the USEPA in accordance with MDEQ permit processing procedures and the Section 404(b)(1) Guidelines.

- d) Under appropriate circumstances, the MDEQ may refer information regarding possible or alleged violations to the USEPA, and may request that the USEPA consider initiating a parallel or independent enforcement action. Such circumstances include but are not limited to:
  - i) Violations that have or have a reasonable potential to have direct impact on waters of another state.
  - ii) Major or repeat offenses.
  - iii) Violations that have or have a reasonable potential to have major adverse resource impact or an impact on special federal resources, such as federally listed threatened or endangered species.
- e) The MDEQ shall provide the public notice of and a 30-day public comment period on any proposed settlement of a civil enforcement action that is filed in state court. Notice may be provided to the public via the MDEQ Calendar or other appropriate means.
- f) In the event that the MDEQ proposes to resolve a compliance or enforcement issue through a consent agreement (administrative or judicial), and where the impact of the violation is such that federal review would not be waived as described in paragraph 3 of this MOA, the MDEQ shall provide the USEPA with an opportunity to review and comment on the draft consent agreement prior to signature. Once agreement is reached on a consent agreement, the MDEQ shall provide a copy of the executed agreement to the USEPA. If the USEPA objects to authorization of an activity through the consent agreement, any subsequent state authorization shall not provide authorization under Section 404 of the CWA.
- g) The USEPA may request the opportunity to review any compliance and enforcement record. The MDEQ shall provide to the USEPA a copy of the file when requested. The USEPA may initiate independent or parallel enforcement action in accordance with Sections 309 and 404(n) of the CWA.
- h) Prior to proceeding with federal enforcement action against a possible or alleged State 404 Program permit violator or unauthorized discharger, and for purposes of providing notice only, the USEPA shall inform the MDEQ that federal enforcement action is to be initiated. This notification shall be made to the director of the MDEQ or his/her designee. It is expected that preliminary staff discussions will take place between USEPA and MDEQ representatives before initiation of federal enforcement action.



- i) The MDEQ shall not oppose intervention by any citizen in a state civil enforcement action under the 404 Program when permissive intervention in a state enforcement action is authorized by Michigan law.

**3) Federal review of permit applications and waiver of review.**

The USEPA, USACE, and United States Fish and Wildlife Service (USFWS) shall, pursuant to Section 404(j) of the CWA, review each permit application received by the MDEQ except for those categories of discharges for which such review has been waived in accordance with Section 404(k) of the CWA.<sup>1</sup>

The USEPA, after consultation with the USACE and USFWS, shall waive the requirements of Section 404(j) for all but the following classes or categories of discharge:

- a) Draft general permits.
- b) Major discharges. Major discharges are defined as applications for permits that:
  - i) Affect one or more acres of wetland.
  - ii) Include new construction of breakwaters or seawalls with a total length of more than 1,000 feet.
  - iii) Include enclosure of more than 300 feet of a stream in one or more segments.
  - iv) Require relocation or channelization of more than 1000 feet of a stream in one or more segments.
- c) Discharges with reasonable potential for affecting endangered or threatened species as determined by the USFWS.
- d) Discharges with reasonable potential for adverse impacts on waters of another state.
- e) Discharges known or suspected to contain toxic pollutants in toxic amounts (Section 101(a)(3) of the CWA) or hazardous substances in reportable quantities (Section 311 of the CWA).
- f) Discharges located in proximity of a public water supply intake.
- g) Discharges within critical areas established under state or federal law, including national and state parks, fish and wildlife sanctuaries and refuges, national and historical monuments, wilderness areas and preserves, sites identified or proposed under the National Historic Preservation Act, and components of the National Wild and Scenic Rivers System.
- h) Sites identified by the USEPA in advance under provisions of the 404 Guidelines.

The USEPA retains the right to terminate, at any time, in whole or in part, any waiver of the requirements of Section 404(j) by sending written notice of determination to the MDEQ.

This agreement does not limit, diminish, or constitute an expressed or implied waiver of the authority of USEPA to prohibit certain discharges pursuant to Section 404(c).

<sup>1</sup> The National Marine Fisheries Service has waived review of all permit applications.

**4) Coordination with other states and tribes.**

- a) Whenever the MDEQ receives an application for a permit that has a reasonable potential to impact the waters of the states of Indiana, Ohio, or Wisconsin, or waters that USEPA has identified to the MDEQ as being within the jurisdiction of federally recognized Indian tribes, the MDEQ shall transmit a copy of the public notice to the impacted state or tribe and to the USEPA. The USEPA shall assist in the identification of regulatory contacts in these other states and tribes.
- b) The impacted state or tribe shall be requested to provide comments to the MDEQ and the USEPA within 45 days of the date of the public notice regarding the potential impact of the proposed project on the waters of such state or tribe.
- c) The MDEQ shall consider the comments and concerns of the potentially impacted state or tribe when making a decision on the application, and shall provide a copy of the final permit decision to a state or tribe that provides comments.
- d) The USEPA may object to the issuance of a Section 404 permit by the MDEQ if it finds that the proposed project would fail to comply with the 404 Guidelines due to the impact on waters of another state or tribe. In this instance, the MDEQ shall proceed as specified in Section 404(j) of the CWA and paragraph 5 of this MOA.
- e) Both the U.S. EPA and the MDEQ agree that this MOA does not waive any legal claims, rights, or positions that the U.S. EPA or the MDEQ have over what constitutes "Indian lands" or "Indian country", as the U.S. EPA defines those terms

**5) Permit processing and federal comment.**

- a) The MDEQ shall promptly submit permit applications in the classes or categories identified in paragraph 3 of this MOA to the regional administrator of the USEPA for review, coordination, and, where applicable, objection in accordance with Section 404(j) of the CWA.
- b) Material submitted to the USEPA shall include:
  - i) A copy of the public notice for any complete permit application received by the MDEQ, except those for which permit review has been waived under this MOA. Any supplemental or additional materials submitted to the MDEQ, including but not limited to information on project alternatives, environmental assessment, or mitigation plans, shall also be forwarded promptly to the USEPA. Whenever requested by the USEPA, the MDEQ shall supply the regional administrator with copies of public notices for permit applications, even for projects for which permit review has been waived.
  - ii) A copy of each draft general permit whenever the state intends to issue a general permit, including minor project categories defined under state law.
  - iii) For permit applications that are subject to direct federal review, notification of when the MDEQ takes a permit action, a copy of every permit issued, and a copy of any denial of a permit.
  - iv) A copy of the MDEQ's response to comments or recommendations made by another state if the MDEQ does not accept such recommendations.

Materials may be forwarded to the USEPA by electronic means.

- c) The regional administrator shall, not later than 30 days from the date of receipt of a permit application from the MDEQ, notify the MDEQ if the USEPA does not intend to review the permit application.

If the regional administrator intends to provide written comment, he/she shall coordinate the region's review with the USACE and the USFWS, and submit comments to the MDEQ in accordance with the requirements of, and in the time frames specified in, Section 404(j) of the CWA. However, the USEPA shall make every attempt to provide comments within the time frame specified in Michigan law. The MDEQ shall notify the USEPA of decision deadlines for each application.

- d) The MDEQ shall respond to any such comments received from the USEPA in the manner specified in Section 404(j) of the CWA and appropriate sections of 40 CFR Part 233. The MDEQ shall provide a copy of a draft permit, with all conditions, to the USEPA to demonstrate that federal comments have been fully addressed.
- e) In the event that the MDEQ does not resolve an objection by the USEPA to issuance of a permit, but must issue a permit in order to comply with requirements of state law, then the permit issued by the State of Michigan shall not provide authorization under Section 404 of the CWA, and the applicant shall be notified of this fact in writing.

**6) Coordination of mitigation banking.**

- a) The MDEQ and USEPA agree that mitigation banking projects shall be subject to review by an Interagency Review Team (IRT) consistent with the 404 Guidelines, Subpart J. The IRT shall be chaired by the MDEQ, except where the USACE retains Section 404 jurisdiction, in which case the MDEQ and the USACE shall co-chair the IRT.
- b) The USEPA shall participate on the IRT.

**7) Reporting.**

- a) The MDEQ shall submit to the regional administrator of the USEPA an annual report evaluating the state's administration of its 404 Program, identifying problems the state has encountered in administration of its program, and recommendations for resolving these problems. The report shall include:
  - i) An assessment of the cumulative impact of the state's permit program on the integrity of state regulated waters.
  - ii) A summary of the number and nature of individual and general permits issued, modified, or denied during the year, and permits not yet processed.
  - iii) A summary of the number and nature of violations or suspected violations identified and the nature of enforcement actions taken.
  - iv) An estimate of the extent of total impact to state regulated waters from individual and general permits.
  - v) The number of acres of each of the categories of state regulated waters (lakes, streams, and wetlands) that were impacted by dredge or fill material during the year (by either authorized or known unauthorized activities) in excess of one surface acre per project.
  - vi) A summary of any significant changes in program operations or procedures.
  - vii) Other information of particular concern or interest.

- b) Within 60 days of receipt of the annual report, the USEPA will complete review of the report and transmit comments, questions, or requests for additional information to the MDEQ.
  - c) The MDEQ may modify the report to address the comments of the USEPA. The final report shall be made available to the public.
  - d) The period for the annual report shall be the state fiscal year ending September 30, and the report shall be submitted to the USEPA by December 31 of each year.
- 8) Program review and oversight.**
- a) The USEPA may, in accordance with Section 404(i) of the CWA, conduct periodic evaluations of Michigan's 404 Program.
- 9) Modifications.**
- a) The MDEQ shall promptly notify the USEPA of any proposed or actual change in its legal authority that may alter its ability to administer the 404 Program, including:
    - i) An action by the State Legislature to strike down or limit state authorities, or that contemplates cessation of the administration of the Section 404 Program by the State of Michigan.
    - ii) An action by a state court striking down or limiting state authorities.
    - iii) Revision of the state's legal authorities needed to maintain consistency with changes to applicable federal regulations.
    - iv) Proposed transfer of the program in whole or in part to another state agency.
  - b) In response to notification of a change in the state program, the USEPA shall inform the MDEQ in writing of specific concerns regarding state authority, and shall provide the state an opportunity to make any necessary program corrections in accordance with 40 CFR Part 233.
  - c) In the event that the MDEQ determines that it will no longer administer a 404 Program at the state level, the MDEQ shall provide notice to the USEPA and the USACE not less than 180 days prior to cessation of program operation, and shall arrange for transfer of all program materials to the USACE.

- d) Amendments to this MOA shall be in writing. They may be proposed by either party, and shall be effective upon the signature of both parties.

This MOA shall become effective upon approval by the regional administrator of the USEPA.

United States Environmental Protection Agency:

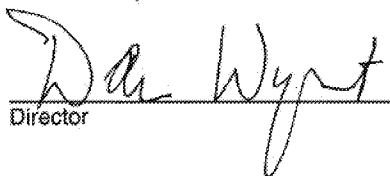


Regional Administrator, Region 5

10-17-11

Date

Michigan Department of Environmental Quality:



Director

11-9-11

Date

MEMORANDUM OF AGREEMENT  
BETWEEN  
THE STATE OF MICHIGAN  
AND  
THE DEPARTMENT OF THE ARMY

I. PURPOSE AND AUTHORITY

- A. Section 404(g)-(1), Clean Water Act (CWA) (Public Law 92-500, Public Law 95-217; 33 USC 1344(g)-(1)), authorizes the Administrator, Environmental Protection Agency to approve a state administered program for the discharge of dredged or fill material into certain waters of the state. The Environmental Protection Agency has promulgated regulations, 40 CFR 233 (1980), describing the specific requirements for transferring a portion of the Section 404 discharge of dredged or fill material permit program from the Corps of Engineers to the state.
- B. The State of Michigan is submitting its state administered program for the discharge of dredged or fill material in compliance with the above cited authorities. This Memorandum of Agreement between the State of Michigan and the Department of the Army Corps of Engineers fulfills the requirements of 40 CFR 233 (1980).
- C. Section 404 of the Clean Water Act authorizes the Secretary of the Army, acting through the Chief of Engineers, to regulate the discharge of dredged or fill material into the waters of the United States. The North Central Division, U.S. Army Corps of Engineers encompasses the State of Michigan in the administration of the Section 404 program.

The Division Engineer, North Central Division, U.S. Army Corps of Engineers, has been delegated the authority to enter into a Memorandum of Agreement with a state assuming administration of the Section 404 program pursuant to Section 404(g)-(e) of the Clean Water Act.

II. DEFINITIONS

- A. State of Michigan means the Michigan Department of Natural Resources, hereinafter referred to as DNR.
- B. Department of the Army means the Corps of Engineers, hereinafter referred to as the COE.
- C. United States Environmental Protection Agency will hereinafter be referred to as EPA.
- D. Regional permits means those regionally issued COE general permits applicable within the State of Michigan.
- E. Nationwide permits means those permits issued by the Chief of Engineers.

III. STATE WATERS TO BE REGULATED

- A. Consistent with the provisions of Section 404(g) CWA, all waters within the State of Michigan shall be regulated by DNR as part of this program OTHER THAN those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including wetlands adjacent thereto. These waters are specifically identified in ATTACHMENT A - "Navigable Waters of the United States in U.S. Army Engineer District, Detroit, November 1981", attached to this Memorandum of Agreement, which will be regulated by DNR and COE under applicable state and Federal statutes.

IV. JOINT PERMIT PROCESSING

- A. When a proposed activity is located in a navigable water of the U.S. and requires both a state permit and permit under the Rivers and Harbors Act of 1899 (Section 10) from the COE, joint processing procedures shall be consistent with those established in the July 28, 1977 Memorandum of Understanding between the Detroit District, COE and the DNR.

V. GENERAL PERMITS

- A. General permits consist of two categories of permits: (1) regional permits issued by the Detroit District, COE, and (2) nationwide permits issued by the Chief of Engineers, COE.
- B. The COE has issued Section 404 regional and nationwide permits within the state for activities regulated by the COE in waters of the state. These general permits remain in force in all waters of the U.S. except in state regulated waters. During the EPA approved state 404 program, the Detroit District, COE, shall suspend the issuance of permits to applicants in other than the navigable waters of the U.S. in Michigan specified in paragraph III. Activities authorized prior to DNR program assumption will remain valid until they expire.

VI. CORPS OF ENGINEERS EMERGENCY OPERATIONS

The COE emergency response and recovery activities under Public Law 84-99 as a result of a natural disaster will, as always, be closely coordinated with the State of Michigan.

VII. CORPS OF ENGINEERS WATER RESOURCE PROJECTS

- A. Detroit District, COE, proposed projects involving the discharge of dredged or fill material into waters of the United States must be developed in accordance with guidelines promulgated under the authority of Section 404(b)(1) of the Clean Water Act, as amended, unless exempted by Section 404(f). For such projects in a water to be regulated by DNR, other than projects specifically authorized by Congress for which the Detroit District, COE, has applied or will apply the Section 404(r) procedures, the Detroit District, COE, will provide the following to DNR:

1. Completed permit application form and plans.

2. An Environmental Assessment or Draft or Final Environmental Impact Statement, which contains the most accurate and complete water quality and related information practicable to allow application of Section 404(b)(1) Guidelines by the DNR.

B. Additional information may be requested if necessary for application of Section 404(b)(1) Guidelines.

C. Detroit District, COE, proposed projects which are determined by the District Engineer to be emergencies, based on the necessity for prompt action to prevent or reduce risks to life, health, or property, or severe economic losses will always be coordinated with the State of Michigan for necessary authorizations.

#### VIII. RECORDS TRANSFER

Upon notification of DNR program approval from the Administrator, EPA, the Detroit District, COE, shall promptly initiate the orderly transfer, to DNR, of pending permit applications with associated documents for activities and records of unexpired issued permits subject to the approved state program. Details for the orderly transfer will be mutually agreed to by DNR and Detroit District, COE.

#### IX. PROTECTION OF NAVIGATION OR ANCHORAGE

If the Detroit District, COE, determines and provides written documentation to the DNR, after consultation with the Secretary of the Department in which the Coast Guard is operating (or his designee), that a proposed activity would substantially impair anchorage or navigation, the DNR shall: (1) deny the 404 permit; or (2) the DNR shall notify the EPA that the DNR does not concur and does not intend to deny the project proposal under the 404 program.

#### X. REVIEW OF PROPOSED STATE PERMITS

A. The Detroit District, COE, waives the right to review DNR permits, except:

1. Major discharges or discharges into areas which could impact existing or proposed Detroit District, COE projects.
2. Discharges that may affect navigation in navigable waters of the U.S.

B. The Detroit District, COE, may modify the waived permit categories upon written notification to Region V, EPA of the requested changes and concurrence by Region V, EPA and DNR.



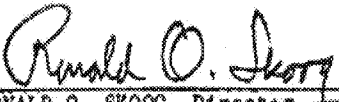
XI. ENFORCEMENT

The COE shall transfer enforcement responsibility for all individual, nationwide, and regional permits for 404 activities in state regulated waters as issued to applicants at the time of DNR program assumption.

XII. EFFECTIVE DATE AND REVISIONS


- A. This MOA shall become effective upon approval of the DNR 404 assumption program by the Administrator, EPA, and subsequent notification from the DNR that it is administering the program.
- B. This MOA and procedures established in conformance with it, shall be reviewed periodically, or at least once every twelve months, by DNR and the Detroit District, COE. Mutually agreed-upon revisions shall become effective upon signed amendments to the MOA. Either DNR or the COE, may initiate revisions when necessary.
- C. This MOA shall be suspended in the event the Administrator, EPA, withdraws approval of the state program pursuant to Section 404(1) CWA, or in the event that DNR notifies the COE and Region V, EPA 60 days in advance of the state's intent to terminate its program.

STATE OF MICHIGAN:

  
RONALD O. SMOOG, Director  
Department of Natural Resources

2 Apr 84  
Date

DEPARTMENT OF THE ARMY:

  
JEROME B. HILMES  
Brigadier General, USA  
Commander, North Central Division

27 March 84  
Date

# NAVIGABLE WATERS OF THE UNITED STATES IN U.S. ARMY ENGINEER DISTRICT, DETROIT

NOVEMBER 1981

In administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, this Department exercises jurisdiction over the waterways listed below, from their mouths to the heads of navigation as follows:

NAME OF WATERWAY	HEAD OF NAVIGATION
AU GRES RIVER, Michigan	U.S. 23 Bridge at Au Gres, 2.8 miles above mouth
AU SABLE RIVER, Michigan	Foots Dam, 7 miles above mouth
AD RIVER, Michigan	Upper City Limits of St. Charles
ELLE RIVER, Michigan	2800 Ft. above northern limits of Marine City
BETSIÉ LAKE, Michigan	Navigable throughout
BETSIÉ RIVER, Michigan	Head of Betsie Lake at Frankfort, 1.3 miles above mouth
BLACK RIVER, Michigan (St. Clair County)	Beach Road 7 miles above mouth
BLACK RIVER, Michigan (Ottawa County)	Head of Black Lake (Lake Macatawa) at Holland, 5.75 Miles from Lake Michigan
BLACK RIVER, Michigan (Van Buren County)	Michigan Central R.R. Bridge at South Haven, 2.5 Miles above mouth
BLACK RIVER, Michigan (Gogebic County)	Navigable 950 feet upstream from mouth
BURT LAKE, Michigan	Navigable throughout
LEELANAU RIVER (LEELANAU RIVER), Michigan	Dam at Leland, 400 feet above mouth
REDAR RIVER, Michigan	0.3 miles above mouth
CHARLOTTE RIVER, Michigan	Country road bridge 1/3 mile above mouth
REBOYCAN RIVER, Michigan	Navigable throughout
ELINTON RIVER, Michigan	Gratiot Ave. Hwy. Bridge, Mt. Clemens
BROOKED LAKE, Michigan	Navigable throughout
BROOKED RIVER, Michigan	Navigable throughout
DETROIT RIVER, Michigan	Navigable throughout
DOORSE RIVER, Michigan	Jefferson Ave. - Biddle St. Bridge, 400 feet above mouth
ELLEN RIVER, Michigan	Whittaker St. Bridge at New Buffalo, 0.25 mile above mouth
GRAND CALUMET RIVER, Indiana	Navigable throughout
GRAND RIVER, Michigan	Fulton St. Bridge at Grand Rapids, 40 miles above mouth
EURON RIVER, Michigan	U.S. 24 Bridge at Flat Rock
INDIAN RIVER, Michigan	Navigable throughout
INDIANA HARBOR CANAL, Indiana	
MAIN STEM	Navigable throughout
CALUMET RIVER BRANCH	Navigable throughout
LAKE GEORGE BRANCH	From the Main Stem to White Oak Avenue in East Chicago
INQUOIS RIVER, Indiana	Navigable throughout
KALANAZOO LAKE, Michigan	Navigable throughout
KALANAZOO RIVER, Michigan	Dam at Allegan, 31.5 miles above mouth
KALANAZOO RIVER, Indiana	Navigable throughout
KALANAZOO RIVER, Michigan	Michigan Central R.R. Bridge at Kawkalin, Approximately 4 miles above mouth
KALANAZOO WATERWAY, Michigan	Navigable throughout, including Portage Lake, Torch Lake and Torch Canal
LAKE BELLE, Michigan	Navigable throughout, including canal to Lake Superior

NAME OF WATERWAY	HEAD OF NAVIGATION
LAKE MICHIGAN, Michigan	Navigable throughout
LAKE ERIE, Michigan	Navigable throughout
LAKE HURON, Michigan	Navigable throughout
LAKE MACATAMA, Michigan	Navigable throughout
LAKE MICHIGAN, Michigan	Navigable throughout
LAKE ST. CLAIR, Michigan	Navigable throughout
LAKE SUPERIOR, Michigan	Navigable throughout
LA PLAISANCE CREEK, Michigan	La Plaisance Road Bridge
LEELANAU RIVER (CAMP RIVER), Michigan	Dam at Leland, 400 feet above mouth
LITTLE CALUMET RIVER, Indiana	Navigable throughout
LITTLE LAKE, Michigan	Navigable throughout
MANISTEE LAKE, Michigan	Navigable throughout
MANISTEE RIVER, Michigan	Including Manistee Lake, 5.6 miles from Lake Michigan
MANISTIQUE RIVER, Michigan	Upper end of lumber slips at Manistique, 3/4 mile above mouth
MAUMEE RIVER, Indiana	Hosey Dam at Fort Wayne
MENOMINEE RIVER, Michigan	From its mouth upstream 1.86 miles to but not including the Interstate Highway Bridge (U.S. 41)
MONA LAKE, Michigan	Navigable throughout
MULLET LAKE, Michigan	Navigable throughout
MUSKEGON LAKE, Michigan	Navigable throughout
MUSKEGON RIVER, Michigan	M-37 Highway Bridge, 39-1/4 mile above mouth (33 Miles from head of Muskegon lake)
NEQUAMING LAKE, Michigan	Navigable throughout including connection to Lake Mich.
NORTHERN RIVER, Michigan	Milwaukee Railroad Bridge 0.76 mile above mouth
OTTAWA RIVER, Michigan	Detroit & Toledo Shore Line Bridge about 3 miles up-stream
PAW PAW RIVER, Michigan	Paw Paw Avenue, Benton Harbor, 2 miles above mouth
PENTWATER LAKE, Michigan	Navigable throughout
PENTWATER RIVER, Michigan	Head of Lake, 2-1/4 miles from lake Michigan
PERE MARQUETTE LAKE, Michigan	Navigable throughout
PERE MARQUETTE RIVER, Michigan	Head of Pere Marquette Lake 3 miles from Lake Michigan
PIGEON RIVER, Michigan	Upper Village limits of Caseville
PINE RIVER (Arenas County)	M-25 Bridge, 1/2 mile above mouth
PINE RIVER (St. Clair Co.)	Detroit Port Huron R.R. Bridge - 3 miles above mouth
PINE RIVER (Charlevoix Co.)	Upper end of both arms, Charlevoix Lake, Michigan 15 miles above mouth
PINNEBOG RIVER, Michigan	Junction with creek, 1/2 mile above mouth
PORTAGE LAKE, Michigan	Navigable throughout
RAISIN RIVER, Michigan	M.C. R.R. Bridge at Monroe - 2 1/2 mile above mouth
ROUGE RIVER, Michigan	M.C. R.R. Bridge at Dearborn (Junction Bridge)
SAGINAW RIVER, Michigan	Navigable throughout
ST. CLAIR RIVER, Michigan	Navigable throughout
ST. JOSEPH RIVER, Michigan	Dam at Berrien Springs, 24.7 miles above mouth
ST. MARY'S RIVER, Michigan	Navigable throughout
SEBOWING RIVER, Michigan	Pere Marquette R.R. Bridge 1/2 mile above mouth
SHAWANEE RIVER, Michigan	Junction with Bad River
SHEWANING LAKE, Michigan	Navigable throughout
SHEWANING RIVER, Michigan (Baraga & Houghton Co's)	50 miles above mouth
TANQUAMENON RIVER, Michigan	Lower Falls, approximately 16 miles above mouth
THUNDER BAY RIVER, Michigan	Dam near upper city limits of Alpena
TITTABAWASSEE RIVER, Michigan	Dam in Midland
TULSA CREEK, Indiana	E. Street Bridge at Michigan City, 1 mile above mouth

PERIOD 194 11/11 EPA CHICAGO

<u>NAME OF WATERWAY</u>	<u>HEAD OF NAVIGATION</u>
TRAVERSE RIVER, Michigan	Navigable 4,500 feet upstream of mouth
MAKINAC RIVER, Michigan	D.S.S. & A.R.R. Bridge 3/4 mile above mouth
WHITE RIVER, Michigan	Navigable throughout
WHITE RIVER, Michigan	Head of White Lake, 6.8 miles from Lake Michigan

All Federal navigation projects are navigable waters of the United States to upstream and/or landward limit of project.

It should be understood that this merely represents the views of the Department since the jurisdiction of the United States can be conclusively determined only through judicial proceedings.

*40 CFR PART 233.13*

*MEMORANDUM OF AGREEMENT  
WITH THE REGIONAL  
ADMINISTRATOR (EPA)*

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MEMORANDUM OF AGREEMENT BETWEEN  
THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION & ENERGY  
AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

I. GENERAL

A. Purpose

This Memorandum of Agreement (hereinafter "Agreement") between the New Jersey Department of Environmental Protection & Energy (NJDEPE) and the United States Environmental Protection Agency (Region II) (EPA), is entered into to enable the State of New Jersey to carry out the policies, regulations and procedures necessary to administer the permit program established pursuant to Section 404 of the Clean Water Act (CWA), 33 U.S.C. 1344, hereinafter referred to as "the 404 program," thereby fulfilling the requirements of the Freshwater Wetlands Protection Act, P.L. 1987, c. 156. This agreement does not create any substantive standards relating to any aspect of the permit program or impose any legal obligations on the public.

B. Parties and Effective Date

(1) This agreement is entered into by the State of New Jersey through the Commissioner of the NJDEPE ("Commissioner") and the United States Environmental Protection Agency through the Regional Administrator of Region II ("Administrator").

(2) This agreement shall be executed by the Commissioner and the Administrator and shall become effective at the time the NJDEPE's authorization to administer the 404 program takes effect, which shall be the date set out in the Federal Register of EPA's decision to approve the State's application to administer the 404 program.

(3) Nothing in this agreement shall be construed to restrict in any way EPA's authority to fulfill its oversight and enforcement responsibilities under the CWA, nor shall it restrict NJDEPE's enforcement responsibilities under New Jersey law.

(4) This agreement will remain in effect until such time as NJDEPE's program authorization is modified or withdrawn by EPA or is voluntarily transferred by NJDEPE to the Army Corps of Engineers (ACOE) according to the criteria and procedures established in 40 C.F.R. 233.53.

C. Modification

This agreement may be modified pursuant to 40 C.F.R. 233.16 upon the initiative of either party. Amendments to this

agreement shall be in writing, and shall be effective upon the signature of both parties.

D. Confidentiality

(1) All of the information EPA transfers to NJDEPE will be provided subject to the procedures and limitations of 40 C.F.R. 233.3.

(2) Any information obtained or used in the administration of the State Program shall be available to EPA without restriction. If information has been submitted to NJDEPE under a claim of confidentiality, NJDEPE must inform EPA of such claim. All information submitted by NJDEPE subject to a claim of confidentiality shall be treated in accordance with the procedures of 40 C.F.R. Part 2., 40 C.F.R. 233.3(c) and N.J.A.C. 7:7A-11.4.

E. Computing Time Periods

In computing any period of time prescribed by this agreement, the day on which the designated period of time begins shall not be included. Saturdays, Sundays, and legal holidays shall be included. When a stated time expires on a Saturday, Sunday or legal holiday, the stated time period shall be extended to include the next business day.

F. Legal Framework

(1) The legal basis for the State's assumption of the 404 program is provided by Section 404(g)(1) of the Clean Water Act, which authorizes the Administrator of the EPA to approve state administered programs for regulating the discharge of dredged or fill material into State regulated waters as defined at 40 C.F.R. 232.2, and by N.J.S.A. 13:9B-27 of the Freshwater Wetlands Protection Act which mandates the State of New Jersey to take all appropriate actions to secure the assumption of the permit jurisdiction exercised by the U.S. ACOE pursuant to the Federal Act.

(2) The implementing regulations concerning assumption of the 404 program under the CWA are found at 40 C.F.R. 230, 232 and 233.

(3) The State's legal authority for the activities required for assumption is provided by N.J.S.A. 13:9B-1 et seq., and N.J.S.A. 58:10A-1 et seq., which authorizes the NJDEPE to issue permits for the discharge of dredged or fill material into waters of the United States within the boundary of New Jersey or subject to its jurisdiction.

(4) Prior to the assumption of the 404 program by NJDEPE, the North Atlantic Division of the United States Army Corps of

Engineers (Corps) has administered the 404 program in New Jersey. The Division Engineer of the North Atlantic Division has been delegated the authority to enter into a Memorandum of Agreement which will transfer the program to NJDEPE pursuant to CWA requirements.

(5) NJDEPE's Memorandum of Agreement with the Corps stipulates joint permit processing responsibilities for activities which involve non-assumable waters, as well as transfer of permitting authority from the Corps to NJDEPE. This agreement identifies the State waters to be regulated, joint processing procedures, general permit procedures, transfer of records, protection of navigation or anchorage, permitting for Corps water resource projects and permitting for emergency work. The legal effect of the Memorandum of Agreement between the NJDEPE and the Corps is conditioned upon approval of the State's program and of this agreement between NJDEPE and the EPA.

#### G. Policy Statement

(1) Each of the parties to this agreement is responsible for ensuring that its obligations under the CWA are met. Upon approval of the State's application from EPA, NJDEPE assumes primary responsibility for implementing certain provisions of the 404 program within New Jersey's boundaries. This will be accomplished under the authority of State law. EPA retains its responsibility to ensure full and faithful execution of the requirements of the CWA, including direct implementation in the event NJDEPE does not act in accordance with the CWA, or does not act in a timely fashion. The Commissioner and the Administrator agree to maintain a high level of cooperation and coordination between their respective staffs and to work in partnership to assure successful and effective administration of the 404 program.

## II. PERMIT APPLICATION REVIEW AND PERMIT ISSUANCE

### A. Lead Agency Responsibility for 404 Program

(1) NJDEPE is the lead agency in New Jersey for administering the State Program. The Commissioner shall administer the State Program as approved by EPA, using this MOA, applicable state and federal laws, and any separate working agreement which shall be entered into with the Administrator as necessary for full administration of the program. The strategies and priorities for permit review, compliance monitoring and enforcement of permits shall be established by the Commissioner and shall be reviewed annually by the Administrator.

(2) NJDEPE is responsible for expeditiously drafting, circulating for public review and comment, issuing, modifying, reissuing and terminating or denying State Program permits for all discharges of dredged or fill material into state regulated waters, as defined at 40 C.F.R. 232.2. The Commissioner has



delegated the State Program to Environmental Regulation subject to the provisions of N.J.A.C. 7:1-1.3. NJDEPE will use procedures and policies found in N.J.A.C. 7:7A and N.J.A.C. 7:11 in its administration of the program.

B. Waiver of Review

(1) Pursuant to Section 404(k) of the CWA, EPA waives the requirements of Section 404(j) regarding Federal review of NJDEPE permit applications for all but the following categories of permits:

- a. Draft general permits;
- b. Discharges with reasonable potential for affecting Federally listed or proposed endangered or threatened species as determined by the United States Fish and Wildlife Service;
- c. Discharges of dredged or fill material which have the potential for adverse impacts on the waters of a state other than New Jersey;
- d. Discharges known or suspected to contain toxic pollutants as identified by section 307(a)(1) of the CWA; hazardous substances identified pursuant to Section 311 of the CWA and Section 101(14) of the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. 9601 et seq.; toxic substances as defined by Section 3 of the Toxic Substances Control Act, 15 U.S.C. 2601 et seq.; and hazardous waste as defined by Section 1004(5) of the Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq.;
- e. Discharges located in the proximity of a public water supply intake;
- f. Discharges within critical areas established under State or Federal law, including but not limited to National and State parks; fish and wildlife sanctuaries or refuges; National and historical monuments; wilderness areas and preserves; sites identified or proposed under the National Historic Preservation Act; and components of the National Wild and Scenic Rivers system;
- g. The filling of 5 or more acres of freshwater wetlands or State open waters and/or any regulated activity which results in significant reductions in the ecological, commercial, or recreational values of five or more acres of freshwater wetlands or State open waters;
- h. Culvert enclosures of more than 100 feet with more than 200 cubic yards of fill in waters regulated by NJDEPE;
- i. Channelization of more than 500 feet of a river or stream.

(2) The Administrator may terminate waiver of the review of categories of permit applications outlined in this MOA as well as the waiver of review of specific permit actions at any time by sending the Commissioner written notice of implementation.

(3) The Department may request review by the EPA of specific projects based on the potential for significant adverse environmental impacts.

C. Review Procedures

(1) The Commissioner shall promptly transmit to the Administrator:

a. A copy of the public notice for any complete permit applications received by NJDEPE, except those for which permit review has been waived under this agreement. NJDEPE shall supply the Administrator with copies of public notices for permit applications for which permit review has been waived whenever requested by EPA.

b. A copy of a draft general permit whenever NJDEPE intends to issue or amend a general permit. The draft general permit shall comply with the requirements of 40 C.F.R. 233.21.

c. Notice of every significant action taken by NJDEPE related to the consideration of any draft general permit or permit application except those for which federal review has been waived.

d. A monthly report outlining all completed permit decisions and jurisdictional determinations. NJDEPE should supply the Administrator with a copy of any permit or jurisdictional determination whenever requested by EPA.

(2) If the information provided is inadequate to determine whether the permit application or draft general permit meets federal requirements, the Administrator may, within 30 days of receipt of the information, request the Commissioner to transmit to the Administrator the complete record of the permit proceedings before NJDEPE, or any portion of the record, or any other information, including a supplemental application, that the Administrator determines is necessary for review.

(3) Unless review has been waived under this agreement, the Administrator shall provide a copy of each of the documents specified at 40 C.F.R. 233.50 to the Corps, FWS, and the United States National Marine Fisheries Service (NMFS) in accordance with the procedures at 40 C.F.R. 233.50.

(4) If the Administrator intends to comment upon, object to, or make recommendations with respect to a permit application, draft general permit, or the Commissioner's failure to accept the recommendations of an affected state, the Administrator shall so

notify the Commissioner in accordance with 40 C.F.R. 233.50. If the Commissioner has been so notified, the Commissioner and the Administrator shall follow the procedures set forth at 40 C.F.R. 233.50.

(5) In the event that NJDEPE neither satisfies EPA's objections or requirement for a permit condition nor denies the permit, the Corps shall process the 404 permit application.

D. Prohibitions on Issuing Permits

No permit shall be issued by the Department in the following circumstances:

(1) When permit does not comply with the requirements of the CWA or regulations thereunder, including the Section 404(b)1 Guidelines (40 CFR Part 230).

(2) When the Regional Administrator has objected to the issuance of the permit under 40 C.F.R. Part 233.50 and the objection has not been resolved to the Regional Administrator's satisfaction.

(3) When the proposed discharges would be in an area which has been prohibited, withdrawn, or denied as a disposal site by the Administrator under Section 404(c) of the CWA, or when the discharge would fail to comply with a restriction imposed thereunder.

(4) If the Corps determines, after consulting with the Coast Guard, that anchorage and navigation of any navigable waters would be substantially impaired.

III. ENFORCEMENT

A. EPA will retain responsibility for all pending enforcement actions for which EPA has requested lead agency status prior to assumption.

B. State Enforcement

NJDEPE will take timely and appropriate enforcement action against persons in violation of the State Program permit conditions and against persons conducting unauthorized discharges of dredged or fill material into state regulated waters pursuant to N.J.A.C. 7:7A-15.

C. EPA Enforcement Oversight

(1) In instances where the EPA determines that the NJDEPE has not initiated timely and appropriate enforcement action regarding a State Program permit violation or an unauthorized discharge, EPA may proceed with any or all of the enforcement options available under Section 309 of the CWA.

(2) Prior to proceeding with federal enforcement action against a State Program permit violator or an unauthorized discharger, and for purposes of providing notice only, EPA shall inform NJDEPE that federal enforcement action is to be initiated forthwith. This notification shall be in the form of a telephone or written communication by the Administrator to the Commissioner or a designee. Except in the exercise by EPA of its emergency power under Section 304 of the CWA, such notification shall be provided in all cases of federal enforcement action regardless of the existence or extent of previous communication between EPA and NJDEPE on the matter. It is expected that preliminary staff discussions will take place between EPA and NJDEPE representatives before institution of federal enforcement action. If EPA fails to provide notice such failure does not invalidate EPA's ability to enforce.

D. Joint Enforcement

(1) Either agency may request the other to take independent or joint enforcement action on any case. Any such request shall be in writing and a response shall be given within 30 days of receipt. Where there may be an imminent and substantial danger to human health or welfare or the environment, such a request may be made by telephone or other means. The details of enforcement coordination will be specified in a yearly NJDEPE/EPA agreement, which will be drafted following state program approval and reviewed annually. The NJDEPE/EPA agreement shall not override the terms of this agreement.

IV. Program Maintenance

A. Duty to Maintain Program compatibility

(1) NJDEPE's State Program will be conducted in conformance with applicable regulations and definitions found in 40 C.F.R. Parts 230 and 233, and in N.J.A.C. 7:7A, unless provided otherwise in this agreement. Whenever any regulations found in 40 C.F.R. Parts 230 and 233 have been revised or amended in a manner which affects the State Program, the Administrator shall so notify the Commissioner. However, nothing precludes the State from adopting or enforcing requirements which are more stringent or from operating a program with greater scope than that required by 40 C.F.R. Parts 230 and 233.

(2) EPA will keep NJDEPE informed of the content and meaning of federal statutes, regulations, guidelines, standards, policy decisions, directives, and any other factors that affect the State Program. EPA will forward copies of all guidance documents, as they become available, to NJDEPE. Guidance documents are to be sent to: Land Use Regulation Program, Environmental Regulation, New Jersey Department of Environmental Protection and Energy, CN 401, 501 East State Street, Trenton, New Jersey 08625. EPA will also provide general technical

guidance to NJDEPE. EPA will share with NJDEPE any national reports developed by EPA from the data obtained through state reporting requirements. EPA shall provide NJDEPE with all guidance and technical resource documents unless EPA is notified that guidance and technical documents are being sent directly to NJDEPE by EPA headquarters.

(3) The Commissioner agrees to inform the Administrator of any proposed or adopted program changes which would affect NJDEPE's ability to implement the authorized program, any proposed transfer or responsibility to another agency, and any other modifications which are significant to administration of the program.

**B. EPA Oversight of State Program**

(1) The Administrator will assess the administration and enforcement of the State Program on a continuing basis for equivalence and consistency with the CWA, this agreement, and all applicable federal requirements and policies and for adequacy of enforcement. This assessment will be accomplished by : (1) timely EPA review of information submitted by NJDEPE in accordance with this agreement; (2) permit overview; (3) compliance and enforcement overview; and (4) annual review of NJDEPE program activities.

(2) The Administrator may also consider, as part of this regular assessment, written comments about NJDEPE's program administration and enforcement that are received from regulated persons, the public, and federal, state and local agencies. Any response by the Administrator to the public comment will be preceded by notice to the Commissioner in accordance with this paragraph. Copies of any such comments received by the Administrator will be provided to the Commissioner within thirty (30) days of their receipt by EPA. The Commissioner will have 30 days from receipt of the copies of such comments to provide the Administrator with NJDEPE's response. The Administrator will take NJDEPE's response into account prior to issuing a response to regulated persons, the public, or federal, state or local agencies. In addition, the Commissioner will be copied on all responses issued by the Administrator within 30 days of their issuance.

**C. Annual Reports**

(1) Within 90 days after completion of the State's fiscal year (June 30), the Commissioner shall submit to the Administrator a draft annual report in accordance with the requirements of 40 C.F.R. 233.52.

(2) The State shall make the draft annual report available for public inspection.

(3) Within 60 days of receipt of the draft annual report, the Administrator will complete review of the draft report and

transmit comments, questions, and/or requests for additional evaluation and/or information to the Commissioner.

(4) Within 30 days of receipt of the Administrator's comments, the State will finalize the annual report, incorporating and/or responding to the Administrator's comments, and transmit the final report to the Administrator.

(5) Upon acceptance of the annual report, the Administrator shall publish notice of availability of the final annual report.

D. Annual Review and Performance Evaluation

(1) EPA shall conduct annual performance evaluations of the State Program from NJDEPE's annual reports and other requested information. The performance evaluation shall determine the State Program's consistency with the program as approved, and with applicable regulations, guidance and policies. The annual review will be conducted within 60 days of receipt by the Administrator of the final State annual report, and will include a review of expenditures of federal funds.

(2) EPA shall submit a report of the evaluation findings to the NJDEPE outlining any perceived deficiencies in program performance and making recommendations for improving NJDEPE operations. If NJDEPE is requested by EPA to respond to the EPA program evaluation report, NJDEPE will have 60 days from the date of receipt of the report to respond in writing. NJDEPE's response shall address each EPA recommendation specifically.

(3) Either party to this agreement may call a meeting to discuss NJDEPE's annual report, the annual review process, and/or the performance evaluation.

E. Procedures for Revision of the State Program

(1) Either EPA or NJDEPE may initiate program revision. Program revision may be necessary when the controlling federal or state statutory or regulatory authority is modified or supplemented or for other reasons. The NJDEPE shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities.

(2) Revision of the State Program shall be accomplished in accordance with the requirements of 40 C.F.R. 233.16 and of applicable State law.

F. Transfer or Withdrawal of State Program

(1) The EPA may withdraw program approval from NJDEPE upon a finding that the State Program no longer complies with the requirements of the CWA and implementing regulations, and that NJDEPE has failed to take corrective action.

(2) The criteria and procedures for withdrawal of a state program, found at 40 C.F.R. 233.53, shall govern program withdrawal.

(3) NJDEPE may voluntarily transfer the State Program to the Corps using the procedures at 40 C.F.R. 233.53(a).

VII. Signatures

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY

Date: 3-4-97

By: Scott A. Weiner  
Scott A. Weiner, Commissioner

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION II

Date: 6/15/93

By: William Mustynski  
William Mustynski  
Acting Regional Administrator

In Reply Refer To:  
FWS/Region 5/ES

DEC 22 1993

Mr. William J. Muszynski  
Acting Regional Administrator  
U.S. Environmental Protection Agency  
26 Federal Plaza  
New York, New York 10278-0090

Dear Mr. Muszynski:

On May 4, 1993, the Environmental Protection Agency (EPA) requested the Fish and Wildlife Service (FWS) concur with the determination that EPA's approval of the New Jersey Department of Environmental Protection and Energy's (NJDEPE) application to assume the Section 404 permit program pursuant to the Clean Water Act of 1977 (33 U.S.C. 1344 et seq.) (State assumption) is not likely to adversely affect federally-listed threatened and endangered species. By FWS' letter of May 25, 1993, we were not able to concur with that finding, based on analysis of NJDEPE's proposed program. FWS suggested that an MOA outlining an adequate conservation program for listed species would, if implemented, allow FWS to concur that the State assumption "is not likely to adversely affect" these species.

In the ensuing months, EPA, FWS, and NJDEPE have worked on that MOA, which all three parties signed on December 22, 1993. In light of that agreement, FWS can now concur that New Jersey's assumption of the Section 404 permit program is not likely to adversely affect federally-listed species.

Authority

This response is provided as informal consultation on the subject action pursuant to section 7(a)(2) of the Endangered Species Act of 1973 (ESA) (87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.) and regulations (50 CFR §402.13) to ensure the protection of federally-listed threatened and endangered species.

Federally-listed Species

Federally-listed species dependent on the waters and wetlands within the jurisdictional boundaries of the proposed State assumption include: swamp pink (*Helonias bullata*), Knieskern's beaked-rush (*Rhynchospora knieskernii*), and the bald eagle (*Haliaeetus leucocephalus*). Another



Mr. William J. Muszynski

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federally-listed species, sensitive joint-vetch (*Aeschynomene virginica*) does not appear within the jurisdictional boundaries covered by the State assumption, however, this species occurs within the tidal freshwater wetlands immediately adjacent to the assumption boundaries and could be directly impacted by activities in State-assumed wetlands and waters upstream of its habitat. Three other federally-listed species, the Indiana bat (*Myotis sodalis*), American chaffseed (*Schwalbea americana*), and the small whorled pogonia (*Isotria medeoloides*) are not wetland species; however, they could be indirectly affected by projects requiring State-assumed Section 404 permits in New Jersey.

Attached are the lists of municipalities in New Jersey where federally-listed species are documented to occur. These lists represent FWS' current determination of locations where any category of discharges will have reasonable potential for affecting endangered and threatened species, as provided in 40 CFR Part 233.51(b)(2), and thus are not subject to waiver. FWS will revise these lists as species are added to the federal list of endangered and threatened species, as species are extirpated from New Jersey, or as new information on listed species or potential impacts to those species becomes available.

#### Candidate Species

Candidate species are species under consideration by the Service for possible inclusion on the list of Endangered and Threatened Wildlife and Plants (50 CFR Parts 17.11 and 17.12). Currently, there are 47 federal candidate species (Categories 1 and 2) in New Jersey, many of which are dependent on freshwater wetlands. FWS is mandated to continually monitor the status of those species to determine priorities for listing. If listed, these species will receive the full protection provided by ESA.

#### Incidental Take

Coordination under the MOA is designed to eliminate adverse effects to listed species and designated critical habitat. When this coordination process fails to eliminate take considered "incidental take" under the ESA, the State and/or applicant must seek authorization for such incidental take of federally-listed animal species under section 10(a)(1)(B) of the ESA (the habitat conservation planning process). EPA should insure that NJDEP advises permit applicants that their project has not undergone ESA section 7 review, and therefore, the action is not entitled to protection from prosecution under section 9 of ESA, as no incidental take statement has been issued. Take of federally-listed plants is a violation of State law, and thus a violation of section 9 of ESA.

#### Conclusions

FWS has reviewed the State's program and EPA's procedures for review of permit applications outlined in the attached document entitled "Memorandum of Agreement Among the U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, New Jersey Department of Environmental Protection and

Mr. William J. Muszynski

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Energy Related to the Protection of Federally-Listed Threatened and Endangered Species and Designated Critical Habitat Under a New Jersey Assumed Section 404 Program," dated December 22, 1993. The procedures described in that agreement (MOA procedures) do not constitute procedures for consultation pursuant to section 7(a)(2) of the ESA. These MOA procedures are designed to eliminate adverse effects to federally-listed species and critical habitats through alternative coordination.

Under MOA procedures, when adverse effects cannot be eliminated through informal coordination between NJDEPE and FWS, EPA has committed to ensuring that a State permit will be issued only if it is not likely to jeopardize the continued existence of federally-listed species or result in the destruction or adverse modification of designated critical habitat, and if it avoids or minimizes incidental take of federally-listed species. When the State cannot agree with EPA's decision, the permit application will be transferred to the Corps of Engineers for processing under Section 404 of the Clean Water Act. Any residual incidental take must be dealt with under section 10(a)(1)(B) of the ESA if not addressed through section 7 consultation with the Corps.

The procedures adopted in this consultation are specific to the circumstances surrounding State assumption of the Section 404 program for the freshwater wetlands and other State waters of New Jersey. I would advise you for planning purposes, that future consultations on state assumptions will be conducted as programmatic formal consultations, requiring preparation of all data enumerated at 50 CFR §402.14(c), the ESA consultation regulations.

If changes in the State program occur or additional information on effects to listed or newly listed species or critical habitat becomes available, this determination of concurrence may need to be reconsidered, and section 7 consultation may have to be reinitiated.

Other issues

This ESA consultation does not address all FWS concerns about the proposed State assumption. FWS identified many significant concerns other than endangered species in our September 2, 1993, technical comments on NJDEPE's assumption application. We look forward to EPA's response pursuant to 40 CFR 233.15(g).

Sincerely,

**Ronald E. Lamberton**

Regional Director

Memorandum of Agreement

Among the

U.S. Fish and Wildlife Service  
U.S. Environmental Protection Agency  
New Jersey Department of Environmental Protection and Energy

Related to the Protection of Federally-Listed  
Threatened or Endangered Species and Designated Critical Habitat  
Under a New Jersey-Assumed Section 404 Program

WHEREAS: The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) are the federal agencies responsible for implementing Section 404 of the Clean Water Act of 1977, as amended (CWA) (33 U.S.C. 1344), which regulates the discharge of dredged or fill material into waters of the United States, including the freshwater wetlands in New Jersey;

WHEREAS: The U.S. Fish and Wildlife Service (Service) is the primary federal agency responsible for ensuring that species and their critical habitat listed or designated, respectively, pursuant to the Endangered Species Act of 1973, as amended (ESA) (16 U.S.C. 1531 to 1544), under the Service's jurisdiction, are protected as mandated by federal law, and such species occur in New Jersey;

WHEREAS: According to Section 7 of the ESA, and its implementing regulations (50 CFR Part 402), the EPA and other federal agencies are responsible for consulting with the Service for any actions they fund, authorize, or carry out that may affect species or critical habitat listed or designated, respectively, pursuant to the ESA and for utilizing their authorities to further the conservation of federally-listed species;

WHEREAS: According to Section 404(g) of the CWA, and its implementing regulations (40 CFR Part 233), a State can apply to assume the regulatory authority for Section 404 and the EPA can approve such application, provided the State program is as stringent as the federal 404 program;

WHEREAS: The New Jersey Department of Environmental Protection and Energy (NJDEPE), for the State of New Jersey, has submitted an application to the EPA to assume the regulatory authority under Section 404 for freshwater wetlands and other State waters in New Jersey;

WHEREAS: According to the CWA's Section 404(b)(1) Guidelines (40 CFR Part 230.10(b)(3)), Section 404 permits cannot be issued if they would jeopardize the

continued existence of a federally-listed species, or result in the adverse modification of a designated critical habitat, unless an exemption from the ESA is granted by the Endangered Species Committee;

WHEREAS: According to the rules implementing the New Jersey Freshwater Wetlands Protection Act (NJFWPA) (N.J.C.A. 7:7A-3.5(a)(2 and 3)), state freshwater wetlands permits cannot be issued if they would jeopardize present or documented habitat or the continued existence of a local population of federally-listed species, or result in the destruction or adverse modification of critical habitat;

WHEREAS: According to the EPA's 404 State Program Regulations (40 CFR Part 233.51), all applications for Section 404 permits with reasonable potential for affecting federally-listed species must be reviewed by the EPA after assumption is approved;

NOW THEREFORE: The EPA, the Service, and the NJDEPE agree, as a matter of comity, to implement the following procedures regarding the protection of federally-listed species and designated critical habitat under the State of New Jersey's assumed Section 404 permit program for freshwater wetlands. The procedures in this Agreement do not constitute procedures for consultation pursuant to section 7(a)(2) of the ESA. This Agreement is specific to the circumstances surrounding State assumption of the Section 404 program for the freshwater wetlands and other State waters of New Jersey. These procedures do not create any substantive standards relating to any aspect of the permit program or impose any legal obligations on the public.

#### I. PARTIES AND EFFECTIVE DATES

- A. This Memorandum of Agreement (MOA) is entered into by: the Regional Director, Region 5, for the Service, the Acting Regional Administrator, Region II, for the EPA, and the Acting Commissioner of the New Jersey Department of Environmental Protection and Energy.
- B. This MOA shall be executed by the aforementioned parties in conjunction with the EPA's approval of the State's application for assumption of the Section 404 program. As such, this MOA shall become effective immediately upon the EPA's approval of the State program.
- C. This MOA shall remain in effect until modified or revoked by agreement of all parties, or upon the EPA withdrawing authority from the State and returning the Section 404 program to the Corps. Parties to the MOA may propose, in writing, revisions to the terms and procedures of the MOA at any time. Such requests should be submitted to all parties concurrently. If any party to this Agreement identifies a procedural or substantive breach of the Agreement by any other party, the Region 5

Regional Director for the Fish and Wildlife Service, the Region II Regional Administrator for the EPA, or the Commissioner of the NJDEPE may call a meeting with the other parties within 30 calendar days to discuss the matter and agree upon appropriate corrective measures to be implemented within 60 days of the meeting. The corrective measures may be in the form of written guidance to field personnel or proposed modifications to this Agreement.

## II. GENERAL

- A. Federally-listed species means those species identified as threatened or endangered pursuant to Section 4 of the ESA, as specified in 50 CFR Parts 17.11 - 17.12, and subsequent amendments thereto. Species proposed for federal listing, through publication of a proposed rulemaking in the Federal Register, shall be treated under this Agreement the same as federally-listed species, to the maximum extent allowed by law.
- B. Critical habitat means those areas designated as critical habitat for federally-listed species in 50 CFR Part 17, and subsequent amendments thereto. Habitat proposed as critical, through publication of a proposed rulemaking in the Federal Register, shall be treated under this Agreement the same as designated critical habitat, to the maximum extent allowed by law.
- C. For the purposes of this Agreement, "effects of the action", as it relates to the evaluation of effects of a permit action on federally-listed species or designated critical habitat, has meaning as defined in 50 CFR Part 402.02.
- D. For purposes of this Agreement, the phrase "reasonable potential for affecting endangered or threatened species", as used in 40 CFR Part 233, is synonymous with the phrase "may affect listed species or critical habitat", as used in 50 CFR Part 402.
- E. "Remedial measures" specified by the Service under this Agreement must be capable of being implemented in a manner consistent with the intended purpose of the permitted activity and the scope of the permitting agency's legal authority and jurisdiction. Such measures must also be economically and technologically feasible.

## III. PROCEDURES

The following procedures will occur simultaneously with the NJDEPE's permit review process as described in N.J.A.C. 7:7A. Where required, the NJDEPE's time frames on permit processing are adhered to in order to avoid permit processing delays.

- A. The NJDEPE will provide the Service with a copy of all applications for individual permits and Statewide general permits #2, #4, #6, #7, #10, #11, #13, #15, #18, and

#20, in municipalities with documented occurrences of federally-listed species or designated critical habitat.

- B. Within 20 calendar days of receipt of an individual permit application, the Service may request the NJDEPE to provide additional information to assist its evaluation of the respective permit application. This request will describe the need for the additional information. The NJDEPE will obtain the requested information if available and, upon delivery to the Service, will provide the Service with a new response date.
- C. Within 30 calendar days of receipt of an individual permit application, unless extended pursuant to paragraph III.B. above, or 15 calendar days of receipt of a Statewide general permit application, the Service will review and comment to the NJDEPE on the proposed permit action. When possible, the Service's review will include an inspection of the project area. If the Service cannot participate in a joint inspection with the NJDEPE or conduct a solo inspection, it will accept the NJDEPE's inspection results. The Service's response to the NJDEPE (with a copy to the EPA) regarding the proposed permit action's potential effects on federally-listed species and designated critical habitat will be in one of the following forms:
  - 1. the proposed permit action has no potential to affect federally-listed species or designated critical habitat;
  - 2. the proposed permit has the potential to affect federally-listed species or designated critical habitat, unless the effects are eliminated through remedial measures (project modifications and/or permit conditions) recommended by the Service; or
  - 3. the proposed permit action has the potential to affect federally-listed species or designated critical habitat.
- D. Permit applications that receive a response from the Service as indicated in III.C.1. above will not require federal review pursuant to 40 CFR Part 233.51(b)(2).
- E. Upon receipt of a response from the Service as indicated in III.C.2. above, the NJDEPE will evaluate the recommended remedial measures for consistency with the NJFWPA and its implementing rules and regulations.
  - 1. If the NJDEPE concurs with the remedial measures recommended by the Service, it will impose them as terms and conditions for the permit. The Service and EPA will be informed of the NJDEPE's action in this regard through copies of all correspondence related to the permit action. Permit applications addressed in this way will not require federal review pursuant to 40 CFR Part 233.51(b)(2).

2. If the NJDEPE does not concur (through either technical review or the appeals process defined in N.J.A.C. 7:7A-12.7) with the remedial measures recommended by the Service, it will provide the Service a written explanation (with a copy to the EPA) of its position. Such permit applications will require federal review pursuant to 40 CFR Part 233.51(b)(2).
- F. Permit applications that receive a response from the Service as indicated in III.C.3. above will require federal review pursuant to 40 CFR Part 233.51(b)(2).
  - G. When federal review is required pursuant to 40 CFR Part 233.51(b)(2), EPA shall conduct a review of the permit application pursuant to 40 C.F.R. 233.50. In such cases, the State will provide EPA, along with the application, information needed for review of the application under 233.50(b), including: 1) a description of the action and the specific area, federally-listed species or designated critical habitat that may be affected; 2) a description of the manner in which the action may affect any federally-listed species or designated critical habitat, and an analysis of any cumulative effects; and 3) relevant reports or other information comprising the best scientific or commercial information available or which can be obtained, within the available time under 40 CFR 233.50(b), regarding the affect the action may have on federally-listed species or designated critical habitat. This information may be developed by the State or obtained by the State from the permit applicant. Information already provided to the Service by the NJDEPE pursuant to paragraph III.B. above need not be resubmitted. Proposed and final rules for listing species and designating critical habitat, approved recovery plans, status reports, and previous biological opinions or findings generated by the Service's New Jersey Field Office, need be included by reference only in the information submittal. EPA will send the application and accompanying information to the Service pursuant to 40 CFR Part 233.50(b).
  - H. Based upon its review of the information provided pursuant to paragraphs III.B and III.G. above, and other available information, the Service shall make one of the following determinations:
    1. that the proposed permit action is not likely to adversely affect federally-listed species or critical habitat;
    2. that the proposed permit action is likely to adversely affect federally-listed species or critical habitat, unless the effects are addressed through remedial measures (project modifications and/or permit conditions) recommended by the Service; or
    3. that the proposed permit action is likely to adversely affect federally-listed species or critical habitat.
  - I. The Service will provide its determination and all supporting documentation to EPA within the timeframes established under 40 CFR Part 233.50(b). The Service's determination under paragraph III.H. will constitute the federal comment under 40

CFR Part 233.50(e) with respect to the likelihood of adverse effects of the proposed discharge on federally-listed species or designated critical habitat and the remedial measures that are necessary to avoid adversely affecting such federally-listed species or designated critical habitat. Based upon the Service's determination, the federal comments conveyed to the State by EPA will object to permit issuance or require the imposition of permit conditions to avoid adverse effects on federally-listed species or designated critical habitat.

- J. If the Service determines that the proposed activity is not likely to adversely affect federally-listed species or designated critical habitat, no further coordination with the Service is necessary with regard to endangered species impacts.
- K. Where the federal comment objects to issuance of the permit or requires the imposition of permit conditions to avoid adverse effects on federally-listed species or designated critical habitat, the State is precluded from issuing the permit unless it has taken the steps required by the federal comment.
- L. The State will evaluate the federal comments regarding effects on federally-listed endangered and threatened species or designated critical habitat. If the NJDEPE agrees with the federal comments, it will implement them as part of its permit action. If the State disagrees with the assessment of such effects, the State will provide a written response within 20 days of receipt of the federal comment to EPA explaining its position and providing any supporting information or documentation. EPA will provide the State's response to the Service.
- M. If the State does not agree to take actions specified by the Service to avoid adverse effects to federally-listed species or designated critical habitat, the Service will make a finding as to whether the proposed permitting action is likely to jeopardize the continued existence of the federally-listed species, adversely modify or destroy designated critical habitat, or result in the incidental take of federally-listed species. The Service may also include in its finding appropriate terms and conditions to minimize or avoid adverse effects to the listed species, or discretionary recommendations regarding the development of information or other measures relating to the conservation of federally-listed species. The Service will provide a draft of the finding to EPA when requested.
- N. The Service will issue a finding to EPA within 45 days of receipt of the State's response under paragraph III.L. In the event that EPA submits comments to the Service on the draft finding within 10 days of the deadline for issuing the finding, the Service shall be provided an automatic 10 day extension on the deadline. Based on consideration of the Service's finding, EPA's decision shall ensure that a State permit is issued only if it is not likely to jeopardize the continued existence of federally-listed species or result in the destruction or adverse modification of designated critical habitat, and if it avoids or minimizes incidental take of federally-listed species. In making this decision, EPA shall give the same weight to the finding provided by the Service under paragraph III.M. as an action agency would in the context of a



biological opinion issued by the Service under Section 7 of the ESA. EPA shall notify the Service of its final decision on the action. EPA will reaffirm, modify or withdraw its objection to the State permit, within the time-frames contained in 40 C.F.R. Part 233.50.

- O. In the event that the NJDEPE neither satisfies the EPA's objections or requirements for a permit condition (as determined under paragraph III.N.) nor denies the permit, the permit application will be transferred to the Corps for processing pursuant to 40 CFR Part 233.50(j).

#### IV. INTERAGENCY COORDINATION

- A. Notwithstanding any other provision of this MOA, the EPA, NJDEPE, and Service may interact informally throughout this process. In addition, joint meetings between the EPA, the NJDEPE, the Service, and the applicant may be conducted in an attempt to reach agreement on a permit application with regard to the protection of federally-listed species or designated critical habitat if requested by any affected party.
- B. The current list of municipalities where federally-listed species and designated critical habitat are documented to occur is attached to this MOA. The list of municipalities will be updated every six months based on information received by any of the signatory agencies, or as new species or critical habitat are listed or designated, respectively, pursuant to Section 4 of the ESA.
- C. The Service will be responsible for notifying the EPA and the NJDEPE of any changes in status of federally-listed species and designated critical habitat, including proposals for listing, listings, and de-listings.
- D. The State or EPA, as appropriate lead enforcement action agency pursuant to the EPA/NJDEPE MOA, will notify the Service at the onset of an enforcement action related to any violation under the State-assumed Section 404 program in municipalities where federally-listed species or designated critical habitat are documented to occur. Within 30 days of such notification, the Service will advise the State, or EPA as appropriate, of any adverse effects on federally-listed species or designated critical habitat resulting from the violation and provide advice on appropriate remedial measures.
- E. To the extent practicable and appropriate under applicable Federal regulations, the Service and EPA will assist the State in implementation of the State-assumed Section 404 program, including (but not limited to) making appropriate personnel available for litigation assistance.

V. GENERAL PROVISIONS

- A. The policy and procedures contained in this Agreement do not create any rights, either substantive or procedural, enforceable by any party.
- B. The signatory agencies do not waive any administrative claims, positions, or interpretations they may have with respect to the applicability or the enforceability of the NJFWPA, the ESA, or the CWA.
- C. Nothing in this MOA shall be construed as obligating the signatory agencies to the expenditure of funds in excess of appropriations authorized by law, or otherwise commit the signatory agencies to actions for which they lack statutory authority.
- D. All time frames may be adjusted by agreement of the parties.
- E. Nothing in this MOA authorizes any take of federally-listed threatened or endangered species.

VI. SIGNATURES

U.S. Fish and Wildlife Service

  
Regional Director, Region 5

Date: 12-22-93

U.S. Environmental Protection Agency

\_\_\_\_\_  
Acting Regional Administrator, Region II

Date:

New Jersey Department of Environmental Protection and Energy

\_\_\_\_\_  
Acting Commissioner, NJDEPE

Date:

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VI. SIGNATURES

U.S. Fish and Wildlife Service

Regional Director, Region 5

Date:

U.S. Environmental Protection Agency

Acting Regional Administrator, Region II

Date:

12/22/93

New Jersey Department of Environmental Protection and Energy

Acting Commissioner, NJDEP

Date:

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- E. Nothing in this MOA authorizes any acts of federally-listed threatened or endangered species.

#### VI. SIGNATURES

U.S. Fish and Wildlife Service

Regional Director, Region 5

Date:

U.S. Environmental Protection Agency

Acting Regional Administrator, Region II

Date:

New Jersey Department of Environmental Protection and Energy

Jeane M. Fox  
Acting Commissioner, NJDEP

Date: December 22, 1993